



THE
INDIAN LAW REPORTS
Allahabad Series

Containing Cases determined by the High Court at Allahabad
and by the Supreme Court of India on appeal therefrom

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An agreement for lease on the assumption or belief of both for periods that the existing business would require the premises when the expiry of these terms expires, in case of their wrongful refusal, is void for not to be based on a common knowledge of fact so as to be rescinded, void by s. 10 of the Contract Act

A lease for a term of the continuance of which a case expressly made but a substituted ascertainable from the facts in the deed in other circumstances cannot be said to suffer from an ambiguity so as to be void under s. 19 of the Contract Act

(B) Agreement to lease—Whether and when conclusively void—Lease—Effect of the agreement—Indian Registration Act 1908 ss. 17(1) and 17(2) (B) and 49

It 17(1) (B) read with s. 17(2) of the Registration Act makes a lease in s. 17(1) an agreement in a lease. If immovable property from year to year or for a term exceeding one year conclusively repudiable. The agreement agreement to lease. However even only such agreement is void if it is a present lease

Where a document has all the essential parts of a lease and would be effective without the necessity in existence of any other or further agreement or document to be entered in future it creates a present lease even if it is the fact that it is to take effect in possession obtainable at a future date. Such a document of conveyance is neither void or administratively in violation

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Agricultural Insurance—Company showing defaulting or not satisfactory—Not—Deficiency suffered by the company after—Amount is the share—Insurance of the staff when—Board resolution of C. P. Agricultural Insurance Ltd Act 1941 s. 14(2) and Indian Contract Act 1872 ss. 19(1) and 19(2)

The company in compliance with a notice under s. 13(1) of the United Provinces Agricultural Income Tax Act furnished accounts on 12th September 1938 showing debentures to the credit of Kachhela. These debentures were allowed by the assessing officer but on revision to the Board by the facts the Board reduced the amount of the debt of the salary to Rs. 1,484-12 although the assessing officer allowed a deduction of Rs. 1,484-12 on account of the said salary. Again the order of the Board has reference has been filed under s. 24 of the U. P. Agricultural Income Tax Act.

Filed, that there being no material on evidence before the Board it had no power or jurisdiction to declare any part of the debentures claimed as staff salary by the company.

The Lakshmi Sugar & Oil Mills Ltd. v. State

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Right of accommodation—From sale deed of land—so to be required only by the District Magistrate/Where a person vacant allotment so to made so compulsory sale and so to at possible in accordance with the order of the owner

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Right of the House—Requirement for public purpose—**Allegation**—**Notice**—**Compulsion**, scope of **United Provinces (Temporary) Accommodation Regulations** that s. 2 applicable of

The District Magistrate Lucknow, on April 11, 1938, issued notice the house no. 71 situated at Lakshmi Nagar Lucknow, under s. 2 of the U. P. (Temporary) Accommodation Regulations, 1937. This house was allowed to and was occupied by Mr. B. L. Srivastava, who stayed in a house he took for himself. Mr. B. Srivastava the person was living with B. L. Srivastava as a guest or as a relative. He applied for allotment, but on April 12, 1938, a notice was served by the District Magistrate of B. L. Srivastava that the house was required and B. L. Srivastava was directed to hand over possession to the State Control and Eviction Officer Lucknow. B. L. Srivastava contended that he was an occupant and he should be served with the notice.

Filed (i) that the person who was living in a guest of the allotment cannot be considered to be an occupant of the property and the occupation of the allotment was with Mr. B. L. Srivastava and his relative.

(ii) that the person had no locus standi to challenge the validity of the District Magistrate's order as he was not an occupant.

Subandra Prasad Srivastava v. E. C. Mohd. District Magistrate Lucknow

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1922 August 1925 objection to the award was filed. On 2nd March 1926 the court issued an order on the application for the filing of the award holding that award was given beyond time. An appeal was filed under s. 22 of the Arbitration Act.

Held (i) that the order of the trial court amounts to an order setting aside the award and is appealable.

(ii) also that the date of entering on the reference i.e. 19th January 1925 should be the date on which the arbitrator who was to act in the alternative referred to the reference and hence the award given on 18th May 1925 is within time.

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Arbitration Agreement—See in respect of matter covered by—
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Whether an application for adjournment filed by a Plaintiff
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The Bharat Vegetable Products Ltd. v. Ram Das 323

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Board of Revenue—its powers under by a Judicial Member upon any application for revision.—Judicial Member appointed and took oath as Administrative Member—Comparison of the procedure in and under the ex parte order and actual revision without notice to oppose to parties—*O. P. Saunders, Advocate and Legal Reformer* (1st 1951) at 100 and 101 approved *Proctor's Land Revenue Act, 1926* (17, 189) and also—*Land Revenue Manual*, re 4th and 5th—*United Provinces Tenancy Act 1929* s 107—*Code of Civil Procedure 1908* s 133 *O. XLVII* re 1, 4 and 5—*Construction of Rules* (1951) (1st) 1011

An application to the Board of Revenue for the revision of an order under the Tenureless Abolition and Land Revenue Act was dismissed in part by the Judicial Member concerned. The Judicial Member was later appointed and took oath as the Administrative Member Board of Revenue. His statement on a motion to discharge him under the ex parte order had advanced the revision without notice to the opposite parties.

On a process for a writ in the nature of certiorari to quash the lower order.

Held (1) that the Board of Revenue is a quasi-judicial body in so far as disposal of judicial work, is concerned. A Judicial Member therefore who is transferred to and put in charge of the work on the administrative side of the Board of Revenue cannot be deemed to renounce or discontinue jurisdiction in the court for the purposes of *O. XLVII* s 4 of the Code of Civil Procedure as an amiable or regular law officer in revenue law matters passed while acting as a Judicial Member.

(2) that s 107 (b) of the United Provinces Land Revenue Act to the effect that a single Member of the Board of Revenue shall not have power to alter or reverse a decree or order passed by Board or any other Member does not prevent him, not named or appointed as presiding officer under the *Construction Abolition and Land Revenue Act*.

(3) that neither the United Provinces Tenancy Act, nor the rules framed thereunder, including r 109 of the Revenue Manual apply to revisions under the *Tenureless Abolition and Land Revenue Act*.

(4) that it is competent for one or more of the Judicial Members who constitute the Board for that purpose to reverse or alter an order passed by the presiding or presiding officer in the case may be.

(5) that *O. XLVII* r 4 of the Code of Civil Procedure has no application to a case of this kind and it is open to a court to refuse and set aside an ex parte order of dismissal without notice to the opposite parties.

(6) that proceedings by way of certiorari are not of course and the writ that they are issued was without jurisdiction or that

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there was an error apparent on the face of the record was not sufficient to justify the issue of this writ, it must in addition be established that the erroneous order had resulted in injustice to the petitioner.

There being no such consideration and the petitioner having had and got treated at the alternative remedy of moving the Board itself for appropriate relief, the petition must fail with all that ground.

Impey, Mahan Bai v. Board of Revenue

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A P who had for decades of years in India where he and both of his parents had been born and living ever since spent briefly for Government service in and returned to Pakistan after the free day of March 1947. He served Pakistan Government for ten months and then resigned and came back to India in February 1948. On the 22nd August 1948 he obtained a certificate of registration as an Indian citizen from the Collector of Ponnur and was entered in the U. P. Legislative Assembly in 1957. His election being challenged, over this, on the ground still he was not a citizen of India.

Held (a) that notwithstanding the fact that he fulfilled all the conditions for Indian citizenship under Art. 3 of the Constitution, he can still within Art. 3 so that he never acquired Indian citizenship under the Constitution.

(b) that for the purpose of acquisition of Indian citizenship by registration under the Citizenship Act, he was not covered.

(c) that by s. 14(1) where he could not be said to have ever renounced or been deprived of Indian citizenship.

(c) not by a §(1) (c) since he could not in the absence of the express sanction by the Central Government under s. 2(1) (c) be deemed to be a citizen of Pakistan

(c) not by a §(1) (c) as a person of Indian origin and native resident of India and being in custody he was unable immediately before making the application for registration

(c) that it was under the circumstances not necessary for him to obtain registration from the Central Government and that the expenses for the Collector being great and sufficient, he being the citizen of India on the 1st of August, 1947 and was therefore duly qualified for the membership of the Legislative

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Contracts by the Union as a State—How to be executed and expressed—Non-compliance with respective forms, effect of—Government of India Act 1955 [ch. Ives 3, 45 (1) & 1955]—Constitution of India 1950 Art. 199 (1)

The constitutional requirement is that all contracts by the Union as a State shall be expressed or be made by the President or the Governor as the case may be. A contract which does not conform to the prescribed mode though not void, is unenforceable against the Government unless it obtains its validity and be bound by it.

U. P. Government v. Nathu Ram Gupta

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Cooperative Societies in Uttar Pradesh—Fixed of salaries on higher scale of pay increased for—Division of salaries into two sections—Salaries on one section given the higher scale as a matter of course while those on the other subject to a qualifying test—Falsely of—Constitution of India, Art. 14, 16 and 310-311

On the recommendation of the Pay Commission the State of Uttar Pradesh increased a higher scale of pay for the officers in the Cooperative Department. This department was then after split up into two sections—the State Cooperative Societies Auditing Section and the Cooperative Societies Auditing Section (General)—and, while those in the latter were given the higher scale as a matter of course those in the former were to receive it subject to a qualifying test prescribed by the department.

In a petition under Art. 311 of the Constitution, alleging the on order detecting the State of Uttar Pradesh to give the persons in the General Section the higher scale of pay amounts wrongfully.

Held overruling the preliminary objection that there is no between the constitutional guarantee under Art. 14 and the power conferred by Art. 310-311 on the authority of the State Government by the various provision applicable now in force. The case was one of all the power—legislative, executive or judicial—derived from the Constitution and a function that under Art. 310 are subject to and must be controlled by the provisions of Part III of the Constitution. The provisions of Art. 14, as therefore available to a Government servant against any action which amounts to a purposeful discrimination, so distinguished from a bona fide exercise of power under Art. 310.

held (i) further that the guarantee of equal opportunity under Art. 16 (1) of the Constitution in matters relating to employment or appointment to any office under the State is not based on the stage of initial employment and has no application to matters after entry in service such as promotion, selection for higher posts, increase or reduction of salary, continuance or termination of service.

(ii) that the Government's decision to suppress a qualifying post on General duties was correct and the error, if any, could not be rectifying the same by reference from a similar post. The qualification or experience standard of the staff of any department must however be left to the sole discretion of the Government and the High Court has no jurisdiction to interfere with the decision of the executive in this sphere. Moreover a court may under Art. 32 for the protection of its own right but not to prevent any other organ from discharging something in which it was not legally entitled (case of *que adhibere et laborare per nos est compesce*).

Moradabad v. State of Uttar Pradesh

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While labour disputes between the Upper Gangetic Valley Electricity Supply Co. Ltd. Moradabad and its employees were pending under also before the Regional Conciliation Officer Kanpur and the Labour Appellate Tribunal D. G. A. Kanpur Division of the Company dismissed D. G. A. Kanpur Division on the strength of provisions inserted into 361 A. Where notification no. 4,464 (S.L.) (XIV) B—1951 dated 14th July 1952 for the Labour Appellate Tribunal done under s. 25 Industrial Disputes (Appellate Tribunal) Act, 1950. Thereupon further notification Moradabad continued compliance against D. G. A. under s. 24 (1) Industrial Disputes Act, 1947 and with Government, Moradabad, no. 4,464 (S.L.) (XIV) B—1951 (S.L.) 1952 dated 14th July 1952 for the above dismissal without permission from the Regional Conciliation Officer of the area concerned.

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Upon application by the accused under s 348 3/4 A. Cr. Code, *Prohibition Code*

Held (a) that there was no allegation of bad faith, and there could be no presumption of bad faith against the accused

(b) that he had acted in good faith as defined in s 40(2) U. F. General Clauses Act

(c) that his illegal person amounted to an done under s 43(4) U. F. General Clauses Act

(d) that he was protected by s 122 U. F. Industrial Disputes Act

The criminal proceedings were therefore quashed

D. G. Acharya v. State

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Criminal Proceedings—Inherent power of High Court to interfere in—When exercised—Inherent power of High Court—Exercise of, in pending case—Code of Criminal Procedure, 1898 ss 439 and 348 A

Of the several complaints filed against different branches of the U. F. Electricity Supply Company, some were against the company alone some against the company through their Resident Engineer who it was proved should be tried for the offence committed by the company and others against the company as the various other persons such as the General Manager, Chief Engineer or Resident Engineer in their personal capacity. The respective Magistrates took cognizance of these cases and the proceedings reached the stage at all three of the case of summons for the appearance of the accused as some apprehension had been created while in which prosecution records had been recorded

In an application to the High Court under s 348 A of the Code of Criminal Procedure for the appropriate relief against the above proceedings on the ground (a) that the alleged breach of the provisions of the Indian Electricity Act or the Rules made thereunder did not constitute a crime and could at best involve a civil liability or the commission of the offence owed to the company (b) that on the face of the complaint itself there was no foundation for the trial of or the issue of the process against the individuals

Held (a) that the inherent power of the High Court possessed under s 348 A of the Code could not be invoked, whereas in the case an appropriate relief was available under the express provisions of the Code

(b) as to (a) that the objection could well be taken before and made in the initial stage be left for the decision of the Magistrate himself and the application could ultimately come to the High Court through a reference or revision against that order and its

in (b) that the proceedings against the individuals were altered and were to conform with the Magistrate in other cases; must be directed not to issue any process in the name of Resident Magistrate in their personal or even representative capacity.

(c) Further, that the personal relief would however be granted by the High Court not under s 345A but under s 345B rather by issuing the application in writ or issuing writ itself in its discretion as required.

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Criminal Trial—Criminal Process—Hunger strike—Prison Act 1944, s 3(2) and 33 and Jail Manual, Chapter XXVI, para 747 and Chapter XXX, para 305 scope of.

Held (i) that the act of going on hunger strike is an offence under para 747 of the Jail Manual and is punishable under S 33 of the Prison Act provided the accused was a prisoner under s 3(2) of the Prison Act.

Where the accused allegedly refused to take food to seek a release for his supposed grievance it may be held that the accused was on hunger strike and has now fallen under para 747 of the Jail Manual.

(ii) Para 747 of the Jail Manual does not exclude the operation of its provisions against those who had already started hunger strike outside the jail but who continue it after coming to jail. Hunger strike has been made an offence by the State and the act of hunger strike per se does not constitute an offence.

Where the accused was committed to jail on the basis of an order issued by a proper authority and not because he went on hunger strike, but while in jail he went on hunger strike then that case falls under s 33 of the Prison Act for he committed a breach of the rules framed for maintaining discipline in jails.

(iii) Also that every fresh act of refusal to take food at the time when meals are given to prisoners in jail would constitute a fresh offence.

Lakshmi Narain v State

1

Criminal Trial—Murder—Blackmail Telling, the accused—Inter-view with the wife—Cross and re-direct prosecution—Cross-Examination—Indian Evidence Act, s 155 s 156—Scope of—Indian Penal Code s 305 in 306 Explanation 1 para 314 scope of.

It is proved that Ram Nishu deceased was killed by the accused applicant in the bus on the Government House roadward on 12th Jan 1961 and it is contended that the applicant committed the crime when he had completely lost his

self-control and his case falls under s. 304, Indian Penal Code and not s. 302.

The prosecution alleged that the deceased had come to the aid of the appellant on his alarm even though the deceased had suspected in earlier occasions that he carried on an illicit commerce with his wife and had gone even to the extent of drawing the attention of the community Panthakas to this fact. The appellant was also uttering words that he was clearing reputation to the deceased because in his opinion the latter was having an intrigue with his wife.

Held (i) that where it becomes apparent from the evidence led in the case whether produced by the prosecution or the defence that an exception would be applicable, the presumption against the accused is removed and the case placed upon him is discharged and court must consider whether the case of the accused is covered by the exception or not irrespective of the moral value or the plea advanced by him. Where an admission of the facts evinces the issue is left in doubt, the benefit of the exception cannot be denied to the accused.

(ii) that where the prosecution case itself indicates that an exception is applicable in favour of the accused the accused cannot be denied the benefit of that exception whether he pleads it or not.

Where the accused is living in a foul, pestiferous and filthy hut, the chief witness which might have formed earlier had agreed to move because of the changed place of residence or other circumstances and then suddenly he finds that he was mistaken in his belief and the witness now announced all the same that would amount to a sudden knowledge which would raise in a doubt in him and the circumstances established in this case prove that the accused when he killed the deceased had had his sufficient notice of a grave and sudden provocation and his conduct is protected by Exception 1 to s. 302, Indian Penal Code and his offence falls under s. 304, Indian Penal Code and he can be convicted only under this section.

Ratio Lati = Ratio.

233.

—Production of documents in—Order for, against the accused—*Police v. Code of Criminal Procedure*, s. 134—*Construction of Order 134* Art. 100.]

An order passed under s. 134 of the Code of Criminal Procedure calling upon the accused to produce a document in his possession and likely to be used against him attracts the production laid down under Art. 100(2) of the Constitution—*Government v. Sankar*—and is therefore, valid and liable to be set aside.

R. C. Gupta v. State

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Deference of summary —When available to an injured person in a criminal trial	418
Delegation of authority —By the State Government under s. 44, U. P. Industrial Disputes Act, 1947 is confined to reference alone of an industrial dispute to a Labour Court or Tribunal only after the State Government has itself decided under s. 42 that such an industrial dispute exists or is apprehended	441
Deport —In s. 3(1)(c) U. P. Agricultural Income Tax Act, 1949 contains but without actually incurred or realized by the taxpayer and not what he should have got or realized	555
"Dismissed for default" —see Order III, Rule 2(a) Civil Procedure Code, 1908—Meaning of	9
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Electric Fission — <i>Proceedings in relation to a civil action for payment of appeal in Supreme Court</i> — <i>Constitution of India</i> , 1950 Art. 135— <i>Code of Civil Procedure</i> , 1908 is applicable and non-applicability of the People's Act, 1947 is not applicable and 118 B. <i>Voluntaries</i> —Stage up to which reference to revision is possible— <i>University for Blind Students</i> is a petition for leave to appeal to Supreme Court— <i>Statute of Court</i> , 1931 Ch. I s. 3— <i>Code of Civil Procedure</i> , 1908 O. III s. 4	
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The right to sue for or be decreed is a right in the legislature or municipal bodies is a civil right and the litigation for enforcing or securing this right is a civil proceeding within the meaning of Art. 133 of the Constitution. It permits the leave to appeal to the Supreme Court from the judgment of the High Court under the Representation of the People Act, 1947 is accordingly inapplicable under the said Article	
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persons were engaged in the family or other support of the Com. India and decide on the evidence adduced the real age of the person deposed as Indian.	299
Indian Tribunal and the Revenue Officer. —Order the U. P. Municipalities Act, 1907 and the U. P. Municipalities (Amendment of Revenue of District) Order, 1922.— <i>Section 104.</i>	300
Indorsement of the District Magistrate. —On the charge that under s. 197, Indian Arms Act, 1878.—Whether judicial notice under s. 197, 198 Indian Evidence Act, 1872 could be taken in proof of valid marriage.	310
Intention in preliminary inquiry. —Power of Presiding Judge to treat it as evidence in the case.—When and how to be done.—Code of Criminal Procedure, 1898 in 111 and 120.	
The power of the Sessions Judge to treat the statement before the Consulting Magistrate as evidence in the case before him must be exercised judicially on sufficient grounds and through a specific decision to that effect.	
Where the prosecution witnesses are alleged to have been won over and misled from their evidence in the preliminary inquiry it is the duty of the Judge to try for their discreditation on other evidence under s. 136 of the Code of Criminal Procedure and reach himself at the truth of the statements made. The mere fact that the Sessions Judge chose to treat it as such will not render the evidence admissible through s. 136 of the Code and the case cannot stand on such an evidence must be treated as such.	
<i>See Lal v. State</i>	316
Intention of Adversary. —Power of High Court in matters of.—Proceedings under the Letters Patent.—Subject to them under Bar Councils Act and the rules thereunder.—Letters Patent (Amendment) 1914. Ch. 71 and (B)—United Provinces High Courts (Amalgamation) Order, 1948 of B.—Indian Bar Councils Act, 1926 s. 4(1) 19(1)—Amendment Bar Councils Rules r. 1.	
<i>Indian Office</i> —Meaning of, for purposes of amendment in an Advocate.	
The power of the High Court regarding the constitution of Advocates under clauses 7 and 8 of the Letters Patent preserved through cl. 4 of the Amalgamation Order must now be read in conjunction with and as subordinate to the provisions of the Bar Councils Act and the rules framed thereunder and the position now is that while the High Court retains substantial power to refuse or to discontinue admission to any person to the roll of Advocates, it can no longer admit as an Advocate a person who is not qualified under the Act and the rules thereunder.	
The admission of a person as an Advocate on the ground of his having held Judicial Office is restricted exclusively to	

members of a political society and is not available in person at any other office even though it may involve performance of duty of a political nature.

T. P. Shalla, as the master of enclosure

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Expense estimated—Of indemnity for breach of warranty of title—Effect of no right under the statutory scheme inferred by s. 11(1) Transfer of Property Act, 1880

335

False information to a public officer—Prosecution for—Authority competent to file the complaint—Charges as to preparation which is to follow—Indian Penal Code, 1860 s. 175—Code of Criminal Procedure, 1908 ss. 239 and 241

Where a false complaint made to a public officer is referred to and required to be by a subordinate officer, the latter is a competent witness, within the requirements of s. 239, of the Code of Criminal Procedure, to examine the prosecution for the offence under s. 175 of the Penal Code.

Moreover, the objection to the validity of a prosecution for want of the required complaint must be raised at the earliest possible opportunity so that the material facts may be brought on record and on failure to do so the order of summary may well come within the saving enacted by s. 241 of the Code of Criminal Procedure.

State Prison v. State

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Stamp is adult register of the Qazi Sahib—Prepared under s. 9, II P. Resolutions Reg. Act, 1907—Entry is to sign of a married, if dead and deceased, and not liable to be removed or an alienation, paid in.

339

Striking—Just also on facts stated of plaintiff in motion case—If defendant is not prepared to substantiate case under s. 11, Code of Civil Procedure, 1908

347

Trust Act—Principles governing interpretation of

352

Food Administration—Food Inspector and Public Analyst under the provision Act—General Clauses Act, 1897 s. 1(4) scope of—Provisions of Food Administration Act, 1934, ss. 7 and 8, applicability of—Administrative of Municipal Board, powers of

Shyam Behari is the owner of a milk shop and Ram Lal has control of the said shop. A food inspector purchased half a litre of milk from Ram Lal, but he put the milk in a glass jar in which were sealed sealed and labelled in the presence of witnesses. Shyam Behari was witness at the time of the sale of milk, but he came down later to find a notice was also given to him. Two sealed sample bottles were sent to the office of the Medical Officer of Health. The Medical Officer of Health sent one sample bottle to the Public Analyst who also has report showing that the milk contained 19 per cent of added water and was adulterated. The Medical Officer of Health on behalf of the Municipal Board Lucknow submitted a complaint against Shyam Behari and Ram

Lab. Bags Lab could not be used.—Providence visited against Board B&A's

Said also that there was no order by the Administration about inspection the Medical Officer of Health of the Municipality failed to launch prosecution of this matter and hence the case plans was paid in law

Municipal Board Lawrence v. Queen School

111

General Manager—Winters employs for purposes of a claim to the railway, served under Winters's Compensation Act

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Guarantee of equal opportunity—Under Act 10(1) of the Commission, in matters relating to employment or appointment to any office under the State—confined to scope of stated appointment

71

Grant of the election cannot be considered to be an acquiescence of the petitioner's suit had no locus standi to challenge the validity of the registration order

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High Court—Power of—If denegated from the jurisdiction of the U. P. District Court under sec. 1 of 1929 by the Governor

107

High Court—Power of—by certificate of Advocate-General to the presence of the Indian Bar Councils Act 1926 and the Rules framed thereunder

107

How purchase agreement is not binding—Contract between—Two of his partners agreement.—The alleged facts must enjoy real equity to constitute it being one as well

102

Said also that persons who can be punished for cheating are the officers & persons who usually sell the materials of food but also the person on whose behalf the adulterated food is sold and means before a notice is to be punished under sec. 7 and 11 of the Prevention of Food Adulteration Act

Said that until facts appertain to made appertain, duty made under the persons Act must be considered to be not of real good and the Food Inspector and the Public Analyst must be taken to be person-composed in act as such when the officers took place

Minors Act—Confined to professional account—U. P. Police Regulation with scope of—Administration within jurisdiction of the Court—Composition of Act 1911 with scope of

Said (a) that the jurisdiction in part 1, minors Act, under Regulation will arise from the fact that the particular person is considered or thought to be confined to professional criminal for which there should be some basis or ground

If in any particular case there is complete absence of any such material the issue in raising a minor there will not only be illegal but also without jurisdiction

(a) further that although the opening of a Justice Court in part of an urban area is within and under the High Court, it is not within an administrative area, but where the area taken is on the basis of a survey or inspection and is within jurisdiction the process of the High Court under Article 221 will not interfere.

*Maharaj Kaur v. Superintendent of Police
Sangre*

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Hospital—Subject to general inspection by the Civil Surgeon—
It can be inferred in its scope of a grant from the Government within the meaning of the notification issued under s. 17 passed under the U. P. Agricultural Income Tax Act, 1939.

102

Foreign estate—When is considered as estate under part 112 of the Jai Mahal, payable under s. 12, Income Tax Act, 1939.

Income tax—Assessment—Time within which power to assess or reassess is exercisable—Issue of notice to show cause made in consequence of a notice after the date of assessment is issued at its expiry—Sect. 25—Income Tax Act, 1939 s. 25(1) 25, 26(1) and 26(2)—Assessment and Reassessment—Place of assessment—Sect. 25—Assessment of Income, 1939 Act and

On 7th March 1939 the Income Tax Officer issued a notice under s. 25(1) of the Income Tax Act.—Notice of income tax assessment to show cause to show cause to show cause on the part of the assessee within eight years of the end of the year of assessment—On the return in respect of his income for the year 1937-38 and reassessed him accordingly. The Appellate Income Commissioner allowed the appeal against the assessment on the ground that the income in question accrued in the financial year 1938-39 so that the time could not be said to have elapsed thereon or to be fixed in the assessment year 1937-38.

The Income Tax Officer accordingly issued his order for the assessment for 1937-38 but with an order on 31st January 1939 a bench of the court s. 25(1) of the reassessment of the income for the assessment year 1937-38. The objection that the notice was issued by him that within proceedings based on the same would be illegal and without jurisdiction being overruled and the notice issued in the High Court through a petition under Art. 221 of the Constitution for the appropriate relief.

Held: (i) that the notice is issued in order to be in time had to be served on or before 31st March 1939 and was therefore overruled.

(ii) that the said notice could not be deemed to be in time served on or to give effect to any finding or decision contained in the order of the appellate authority and the benefit of the revised process in Art. 221 of s. 25—arising from the same later.

any action taken or statement so made could not accordingly be avoided in this case.

(4) that in order to assert the application of the proviso afforded it is necessary—

(a) that the finding or decision contained in the appeal has either must be material and necessary for the disposal of the appeal and must necessarily be confined to an effect only such persons who are parties to the proceedings as those who are in directly connected with or interested in the proceedings and are personally represented by the appeal as is

(b) that the notice issued must unambiguously and definitely follow from the said finding or decision without any reservation or intimation of additional facts or considerations. *J. C. Packer v. Province of Madras* (2) holding that the second proviso to s. 14(1) offended Art. 14 of the Constitution as far as it affected strangers to the proceedings complained.

(3) further, that, the plea of abatement remedy is not available in a case for prohibition and that even in a case for certiorari or writ of habeas corpus the alternative remedy available is necessary hardship and harassment to the petitioner such as the expense and all inconveniences of further proceedings affecting persons of the taxpayer who under a taxing law.

Harris Ltd. v. Income Tax Officer, Kanpur

Income tax appeal dismissed, note period.—*Provision for taxation in assessment—Comptroller of Income Tax, Act 1922 s. 24(1) A—Constitution of India 1926 Art. 14.*

Income Tax Officer—Exercise of power of assessment in—Whether based on charging principle of natural justice—Validity of proceedings.

Indian Penal Code, 1860 s. 106 cl. (4)—Right of private defence of body—Limit with the intention of abducting—Purpose of defence—defining meaning of

In s. 106 Indian Penal Code, the right of private defence of body extends to the voluntary causing of death where an assault is made with the intent of abducting.

When an assault was made on the appellants' house by her husband who compelled her to leave to go away from her father's house and the appellants' husband was injured as a result of the assault which however failed him the High Court expressed the appellants under s. 106, Part II Indian Penal Code holding that the right of private defence of body under s. 106 of Indian Penal Code was not available to the appellants in the words

abducting, were there referred to such (abducting as it is defined under the Code and not the mere fact of abduction as it defined under s. 106 thereof)

Page

On an appeal to the Supreme Court, held, that, on a plain reading of a rule of (c) Indian Penal Code the word, "abducting," used there means the mere act of abducting, as defined under s. 356 of the Code, and does not refer to such abduction as is an offence under s. 354, inasmuch as the Code. An accused having been made an abettor, is never with the purpose of abducting by the appellants has acted in the light of previous definition of livery under s. 306 of (c) Indian Penal Code.

Held further that, the appellants did not induce, more, harm than was necessary.

The appeal accordingly was allowed and the appellants acquitted.

Valdevanath v. State

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Indian Penal Code, 1860 s. 149. *Joint-Force possession—Members—Common object of the voluntary assembly—Fire—Weapons used without intention—Section five part—Outcome between*

By s. 149 Indian Penal Code. If an offence is committed by any member of an voluntary assembly in prosecution of the common object of that assembly, or such as the members of that assembly know to be likely to be committed in prosecution of that object, every person who at the time of the commission of that offence is a member of the same assembly is guilty of that offence. Where the appellants were in a body armed with lethal weapons with the common object of taking forcible possession of land which was in possession of others at any one, and one of the appellants fired a gun at the instance of another member of the voluntary assembly and killed the person in power then.

Held, (a) that the offence of murder may be held to be immediately connected with or in direct prosecution of the common object of taking forcible possession by the voluntary assembly.

(b) Further that the members of any such assembly be held to know that the murder was likely to be committed to accomplish the common object.

Consequently the two fell under s. 149 Indian Penal Code and all the appellants were guilty of murder.

Held further that s. 149 Indian Penal Code is in two parts. The first part of the section applies when the offence committed is not in direct prosecution of the common object, i.e. it is in direct prosecution of the common object of the assembly.

Manoj v. State of West Pradesh

41

Industrial Disputes—*Definition of*—*Definition of power by State Government to Labour Commissioner and Deputy Labour Commissioner*—*Order and validity of*—*Order of Power on Industrial Disputes Act (LITAT of 1947) s. 4 A and 4 B*—*Provisions of*—*Order of 1947*—*Order of 1947*

Section 4 A of the United Provinces Industrial Disputes Act says on the State Government the duty to police within an industrial dispute shall be as specified and means a work the power to take the case for dispute as a Labour Court in Tribunal as the case may be and the dispute shall be by a or it is constant on the first and does not stand in the future which must be discharged by the State Government alone.

Accordingly where the Deputy Labour Commissioner purporting to act through the delegation made under s. 4 A does his own opinion regarding the existence of an industrial dispute and when the time has elapsed in the Industrial Tribunal the reference is made a new complaint and must be quashed.

Labour Federation (The Chittur Lal v. Raj Mohan Lal

Dispute—*Test of the reference from central independence*—

Labour Union Case, 1947 s. 4 A

The delivery of justice is not available to an accused who is shown up here; and it is not for the court which cannot say only in the case of law even before the subsequent in the court which clearly shows this, by appreciation the nature and consequences of his act and who took judicial steps to achieve the object and proper direction and punishment.

The test of justice in law does not involve such that an accused must not s. 4 A of the Penal Code which merely shows that where a person not only did not do his duty but was capable of doing it, the nature, weightiness or display of his act. The commission does not depend on a person who is personally capable of such understanding or judgment, but is professed from or even in determining the same.

Labour v. State

Interpretation of 1947—Definition of definition of Commission—*Order should be taken into consideration*—*Test primarily is not good*

Labour protection or protection work conducted for the benefit of the State—*Order of 1947 and 1947 C. P. Agricultural Income Tax Act 1947—Disputed*

Interpretation of 1947—Principles to be followed

Joint or separate and application—*Interpreting Commission*

Labour Union—*In Rule 1 of the Rules made by the Additional Sec. Commr under s. 4 A, Labour Union Commission 1947—Meaning of the purpose of commission in 1947*

Indemnity of the Board—*or* *deductio—*deductions claimed by the company under Agricultural Income Tax Act—*or* kept any material or evidence before it

145

Indemnity of right—To set aside without notice to and leaving the other party, an ex parte order made against one party when the 1. parties were absent the case and order was made

183

Installation—Of the High Courts—Under Act and Commission of India, 1919—Nature and scope of

149

Installation—To start a home-station under U. P. Police Regs. laws, *et*—*home* laws or regulated territory, pointing to the being a confined, or professional examined—*Officers* such administrative steps necessary and without any material and no without permission High Court, has power under Act, *et* in quasi-*et*

115

Installation evidence—Of the provided evidence under 4 & U. P. Panchayat Raj Act, 1919—To decide questions of the qualifications—Condition on date of election outside the province of an election petition

119

Installation of Civil Courts—Not based under 1, 1919 (U. P. Local Revenue Act, 1919)—In matters connected with the charge or recovery of revenue or cases might result in the—Where plea of lack of power or state fails is raised

141

Labour Commissioner and Deputy Labour Commissioner—Scope of authority of, *et* refer under 1, 11, 13, U. P. Industrial Disputes Act, 1920—No industrial dispute arising or apprehended of to a Labour Court or Tribunal for decision

141

Labour dispute pending before different authorities—Permission to dismiss an employee obtained on good faith from one authority only—*Permission* under 1, 14, U. P. Industrial Disputes Act, 1920 for cessation or return permission from the other authority—If valid—*Refusal* of one does so good faith under 1, 14—If available

141

Landlord and Tenant—Difference of a portion of a house—*Consent* of the landlord—*Need* of the landlord—*No* enquiry into the bona fide of the tenant—*Order* of the Rent Control and Eviction Officer, validity of—*Rules* 1 and 2 under the Rent Control and Eviction Act, applicability of—*Civil Procedure Code* 1908 1, *Interference* in the Rent Control and Eviction Officer, scope of—*How* permission scope of

The plaintiff application is the power of a house of which the room is dispute is a part. On 10th August 1920 the plaintiff got possession of the room, in violation of a decree for possession against the defendant. On 10th August 1920 the plaintiff obtained the Rent Control and Eviction Officer that he desired the room and prayed that it may be released to him. On 10th August

transfer applied to the Home Control and Licensing Office that the room be allocated to them before or for opening a hotel shop. The Home Control and Licensing Office asked the landlord for permission. On this, Tenant says the plaintiff supplied the permission and upon period when he apparently needed the accommodation for his personal use and it should be allocated to him. On each Tenant says the room was allocated to them. However, neither one, neither Tenant, from whom the he took of the plaintiff. On 24th, Tenant says the plaintiff was contacted of the order of such things as in On 24th, Tenant says the plaintiff had a son for inspection in - taking the defendant say, a. Home Kitchen from obtaining permission off the room in the first under the Plaintiff order placed in first time by the Home Control and Licensing Office and an order of permission issued not returning the Home Control and Licensing Office the plaintiff says he is from entering the order of clearance. The delivery of defendant to 1 and that the order placed for want of name under a for Good Procedure, 1 only, and is also ordered under to 1 and all of the United Procedure of Control of Home and Licensing to that the defendant order has been fully given it. From of defendant says he 1 and that the plaintiff has not a name of person against the defendant to 1. That defendant to 1 did not file any necessary payment. The son was delivered to the small court and the lower application was also delivered the sign of and the lower court judge also held that the son was heard. 1 opposed appeal to find

1. Held, (i) that there is nothing on the record to show that the Home Control and Licensing Office ever issued an order under which all of the needs of the plaintiff was due to him to return to the landlord when only one of the interests of the house had fallen vacant. Hence the order of the Home Control and Licensing Office has been passed without compliance of the order issued under the law.

2. (ii) that the right of the plaintiff to occupy the house was a statutory right. It is stated a house that he had under the order a right of occupancy as he has the other purpose. 1 states it is statutory because which has not given to him. Statutory is required to rule 1 an enquiry was made from him about the defendant of the house.

3. (iii) that when an order is made under which rule 1 says that in the event that the plaintiff to 1 of a special order would be of a special order of a person of the law are not followed in view of the fact copies of order have not followed the order would not be maintainable.

4. (iv) that since the defendant says it is a portion of the house where the applicants are themselves living, but would be more relevant to have had all shop in their house where all were

of undesirable people might visit and under the circumstances the affidavit order is held to be

(v) that there cannot be the least doubt that the order of the court has been made without the consent of the landlord and hence the order is held to be

(vi) that it has been as often decided as it has become almost an axiom that in public houses words only necessary police duty is enabling may have a disciplinary time when the thing to be done is for the public benefit or in the advancement of public justice

(vii) that the order of the Rent Control and Eviction Officer cannot be supported in a case in direct breach of rules 5 and 7 of the Act

(viii) that the fact is not bound under 10 and 11 of the U. P. Control of Rent and Eviction Act

(ix) that 10 for 11 the defendant has a concern on which can be granted in the most useful manner under 10. By Civil Procedure Code was not given but it against defendant for 11 he would be not used to be taking possession of the premises under the affidavit order which has been passed

(x) that although it may not be possible for this Court to grant a decree in the rent law, this Court has a jurisdiction under Art. 113 of the Constitution to grant the relief as against the defendant in a case though this matter has no effect on its own jurisdiction an application under Art. 113 because it is the order of the Rent Control and Eviction Officer for the affidavit order contains in favour of defendant for 11 who is restricted from taking possession there is no doubt as to a conflict and it may be difficult for the Rent Control and Eviction Officer to have any further affidavit order

State of Bihar v. Rent Control and Eviction Officer, Lucknow

Landlord and Tenant—Warrant—Due for execution—Possession of a house—Application for possession—Permission by the Rent Control and Eviction Officer—Order under 10 and 11 Transfer of Property Act—Affidavit—Provision under 10 and 11 of the Control of Rent and Eviction Act—Right to possession—Transfer of the party Act 1914 10 and 11 and Control of Rent and Eviction Act, 1947 10 and 11 applicability and scope of—Due, mandatory

In June 1945 of 1955 the plaintiff became the owner of a house by virtue of a sale deed dated 28th June 1945. He then went to obtain possession of the house. He applied permission of the Rent Control and Eviction Officer to evict the defendant and an order dated 24th December 1955 was passed as follows

I allow eight months' time to the opposite party no. 1 and six months to opposite party no. 2 from the date of

making this order in fact was premature for themselves. The applicants will be permitted if the opposite party now 1 and 2 do not make the same within the given time.

The issue was not raised and a decree dated 14th December 1933 purporting to be under s. 104 Transfer of Property Act was given upon the defendant on 14th 21st December 1933 in which he was held to retain the premises by the 31st January 1934.

In between on the 20th December 1933 the plaintiff filed an application for permission under s. 2 of the Control of Rents and Eviction Act for May 1934. On the 15th February 1934 permission was granted by the Rents Control and Eviction Officer and on the 14th April 1934 after obtaining permission the suit was filed.

The defendant went up to appeal against the order under s. 2 to the Commissioner and the appeal was allowed on the 14th August 1934 with the result that there was then no existing permission. The plaintiff filed a revision against the order of the Commissioner to the State Government and on the 14th January 1935 before the suit was disposed of the State Government allowed the revision on under the order of the Commissioner and restored the permission granted by the Rents Control and Eviction Officer on the 15th February 1934.

The delivery to the suit was that the decree under s. 104 Transfer of Property Act dated 14th December 1933 was given prior to the obtaining of permission, which was granted on the 15th February 1934 and therefore decree was ineffective and the suit had to fail.

Now (a) that the permission was granted by the order dated the 15th December 1933, but even if no permission was granted it was premature for the plaintiff to give a decree under s. 104 Transfer of Property Act given prior to permission having been granted under s. 2 of the Control of Rents and Eviction Act.

(b) that a decree under s. 104 Transfer of Property Act will not be dependent on the existence of permission. It can be given before the permission is sought and awarded or after the permission has been granted. The decree was a valid one and the suit was decreed.

Judge, Prasad, Shrivastava, Prasad & Handa
Allahabad Bench

Landlord and Tenant—Permission to file a suit for redemption by the Rents Control and Eviction Officer—Revision—Decree—Order of permission—Delegation of power—Substitution—Decree of Appeal—Decree of permission—Rents Control and Eviction Act 1931 s. 104, s. 2.

Held, that the District Magistrate, as a clerk of the said Privy Council Chamber and Justice Act 1847 means that the District Magistrate may authorize any officer to perform his duties under the Act, but while the District Magistrate may authorize some other officers to perform his functions under the Act he himself at the same retains the powers to exercise his functions and the District Magistrate will also have the power to withdraw any case from the list of the officers who has been authorized by him. The authorizations may be general or special and the language of the s. 23 commences with special authorizations which part of any particular case and is not referred to a general authorization.

Second Last Sub s. 23(2)(a) Transfer of Rights

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Landlord and Tenant—Act for possession—Possession under the compromise till such time as the defendant right steps of any agreement—*Landlord's obligation and Land Revenue Act 1925* (1925/26) and 1921 and 1924 steps of

I was a landowner, of certain plots of land in a village. On 11 July 1921 I sold these plots to J. P. and others who were defendants in the suit. I was succeeded by his two sons, S. J. and P. who took a lease for 99 years and defendants at the same time against the defendants. On 12th March 1922 there was a compromise between the parties under which the defendants were to pay Rs. 100 per month as rent up to such time 1922 and the defendants were permitted to continue to sub-lease up to such time 1922 when they were to pay up payments of the plots to S. J. and P. The defendants did not give possession and after the expiry of such time 1922 J. J. and P. the plaintiffs filed a suit for possession against the defendants who pleaded that they were entitled under s. 23 of the Transfer of Property Act and Land Revenue Act and were not liable to payment. Upon a Second Appeal by the defendants.

Held, (a) that the defendants had acquired certain rights under s. 23(2)(a) of the Act and after acquiring certain rights they were entitled to retain possession of the land in respect of which they acquired these rights.

(b) that the defendants acquired certain rights independently of the compromise and the terms of the compromise did not in any manner affect the rights acquired by them under the Transfer of Property and Land Revenue Act. These rights were not subject to anything which they had and/or undertakes under the compromise.

(c) that s. 23 of the Act did not apply to the defendants who were in possession of the property under the provisions of the Transfer.

(d) also that s. 23 of the Act is applicable to the parties who had claims for payment do not apply to this case.

[4] that the \mathcal{A} -presentations in which the equations of an algebra could be simplified tend to be in very rich quandles given the grounds mentioned in 3.1(a) of the Axi and the fact of the generality is liable to be discussed.

1. **Introduction**
 2. **Background**
 3. **Methodology**
 4. **Results**
 5. **Conclusion**
 6. **References**

Lease agreement: With respect to certain plots of land—Made an assignment of future profits that saying amounts would result on expiry of the existing lease—Gladys was eligible to pay in this agreement. It refers from a national map sale of 1931 and included land water to the Indian Government.

Legal Liability—Not the same thing as medical malpractice — Difference and changes between—arranged by a Rq.

1. *Anticipation* – the degree to which an individual expects to be able to control the situation.

Landfilling—For an application for information on urban waste under the Resource Act 1940—(i) provided by AEC 1941 Indian Landfilling Act 1941

Limitation—Of a number by which or toward to or to which another point or first schedule determined. All years by the appearance on the statement.—To be retained from the date of its closure as reference.

Learnings:—(a) physical forced against him in order to make him do it. He refused to do so because he was under a lot of stress.

Notes added—Of a sector belonging to the intermediate p -of can be advanced on the basis of other sectors belonging to them

Mineralized Water—Water to keep well saturated in spring brine when made as local use.

Heteropoda Klamath.—Balls paper worked on the back only.—
Wetter and when in the unincorporated Fremont Mine
specimen (London of Heteropoda Order, 1922
page 11, 12(1) and 12(2)).

United Provinces Municipalities (Control of Election of Members) Order, 1922 89

In matters relating to the declaration of a duly elected body as such, the jurisdiction of the Election Tribunal under the Municipalities Act is co-extensive with that of the Returning Officer and therefore where the number of votes polled by valid candidates for membership of the Board are declared equal by the finding of the Tribunal it is competent for the Tribunal and not for the court and declare the candidate duly elected as a member of the Board.

Tribunal, Chand v. The Election Tribunal, Meerut 254

Warrant, *Execution*—*Principles of*—Where and where not to be issued by a court 451

Writ—After revocation of a tenure from the provisions for purchase under s. 206 Transfer of Property Act either it depends on and avoids the tenor of provisions from the Revenue Control and Revenue Officer under s. 3 U. P. Revenue Control and Revenue Act 1927—Provisions have amounted to violation the same—Maintenance of writ thereafter 284

Writ—Under s. 40 Civil Procedure Code applied to Government—From scope of prospective writ—Any further writ not granted as the matter was precluded 381

Writ of *certiorari*—Under s. 40 of the Workmen's Compensation Act—Writ of *certiorari* is of the same 449

Writ of *certiorari* s. 34 (1) (a) Income-tax Act—For *restitution*—Where can certain application of the second proviso to sub-s. 3 of s. 34 of the said Act—As being a consequence of or so give effect to any finding or decision in the order of the appeal for recovery 150

Writ of *certiorari*—On a point of law not involving or depending on a question of fact—If may be issued for the first time on appeal 384

Writ of *certiorari* to *void* of *provision* under s. 102, Indian Penal Code, 1860—Where to be issued 107

Writs not exclusively triable by the Court of Session—Proceedings before the Magistrate—Subsequent decision to set aside in Sessions—Proceedings in the Sessions—Effect of such proceedings—Code of Criminal Procedure, 1908 ss. 206, 211, 212 and 247 (1) and 248

If a case not exclusively triable by the Court of Session proceeds to a verdict or judgment and the Magistrate as a lower court declines to remove the accused to Sessions or becomes obliged to proceed under s. 247(1) of the Code of Criminal Procedure and then that accused is indicted the proceedings last done under ss. 206—212 of the Code not of course, *de novo*, but only as far as not covered by the earlier proceedings.

Admissibility of the signature after the execution of the same—*plaintiff under s. 290 of the Code does not succeed in the action for a stamp under s. 295 Indian Penal Code—Contract alleged to be the complaint being in the contract, defendant—writing on the printed form without records the execution of the printed form agreement and does not make a stamp and returns the record to the Court of Justice without complying with the provisions of s. 291 of the Code—admission or denying the stamp if he is doing so will of his right to give evidence is determinative probability of his doing so—no loss such evidence being for the proper verdict—the complaint is filed in 1897*

The breach of s. 291 is of itself sufficient to sustain judgment in the action and failure of proof and there is no question of the application of s. 295 of the Code in such circumstances. The complainant must therefore be quitted on this ground alone.

Quere whether the same investigation must necessarily follow s. 297 breach of s. 291, 292 and 293 of the Code

Orissians Ltd Just v. State of Uttar Pradesh.

322

State—On establishing an exception in favour of the accused party as a common law—State on whom—in extent, and mode of discharge

323

Options—To terminate agreement any time as well existing on the same—Disagreement for purchase agreement from 1881 to 1885

325

Orissians—Circumstances and grounds pertaining to personalty with to the intention of the Government—If possible

327

Paraguay Bay Election—Disqualification of candidate for—Judicial of Election Tribunal to decide—United Provinces Paraguy Bay Act, 1897 s. 3, 3 A, 3 B, 4 and 10—Paraguy Bay Rules 17, 14, 15, 14 and 15

The exclusive jurisdiction of the prescribed tribunal under s. 3 A of the Paraguy Bay Act to decide questions of disqualification was a matter for and must be confined to cases or occasions that arise in the exercise of its elective power and there is nothing in the Act or the Rules to exclude from the jurisdiction of the Election Tribunal the determination of that question when it arises in an elective process.

Attornay Singh v. Sub-Deputy Officer
Cyprus

329

Prohibitory Election—Orissians Petition 10—Security for—Deposit of under the bond of income prescribed by Orissians—Whether sufficient compliance with law—Representation of the People Act 1891 s. 107

334

Prohibitory Deposit—Affidavit of non-receipt of money—Estimate of the Director—Provisions under s. 45 Civil Procedure

Costs—Reduction of the debt—Otter Pauline December Debt Reduction Act 1925 re 1, 2 and 3 and 4 and 5 of PT scope of—Appual immutability of

Kishor Lal with of R. the appellants was the plaintiff when estate was under the Court of Wards in district Gurgaon. She died in 1925 and R. B. Singh and his wife Mrs. R. Singh filed a suit for possession against N. the husband, the defendant no. 2 and the Deputy Commissioner Gurgaon as the Manager of the Court of Wards. On 15th September 1927 there was a compromise between the plaintiff and the defendant no. 2 under which such was created as a mortgage charge of the property in suit. On 15th April 1928 a final decree for payment was passed.

Rs. 500 was paid to the husband, the defendant no. 2 by the Court of Wards by way of maintenance and on 15th September 1928 there was an order by the Court of Wards under which it was ordered that the maintenance allowance which was paid until the date of compromise namely 15th September 1927 will be debited against the share of the defendant no. 2 at the rate of the value of the share from the Court of Wards. If there will be any balance then the amount will be debited from share of the defendant no. 2 the movable—whereas his share in the movable will be reduced proportionally. On 15th September 1927 there was a compromise and it was agreed that the Court of Wards defendant no. 2 shall adjust accounts between the parties by 15th October 1927 in such a way that payments made to the defendant no. 2 shall be adjusted from her share of the property and if any balance is still found payable from the defendant no. 2 it shall be regularly paid to the first charge out of the share of the profits of defendant no. 2 after the payment of Rs. 500 per month to the defendant no. 2. In case the amount due is calculated the payment to the plaintiff at the rate of the interest due from defendant no. 2 shall be a first charge on the share of the compensation which may be payable to the defendant no. 2 and shall be realizable in case by recovery of decree against such compensation or the share of the estate of defendant no. 2 in suit.

When account were done it was found that there was an excess sum which had been paid to the defendant no. 2 the appellants and a decree for that excess sum was passed in favour of the plaintiff.

On 15th June 1928 R. Singh filed an application for cancellation of about Rs. 1000 before the District Judge praying that the amount be restored from interest compensation money by attachment and a similar application was filed by the other plaintiff. The defendant opposed this interest compensation was not liable to attachment under 147. That the decree was in the nature of a debt within the meaning of Act 15 of 1925 and the decree

most important year in a period challenging the validity of the conventional

Wald, 13 (Pvt. Sanguino and CHARLES J. UFFANO, 1
cont'd) that a 24 (1A) of the Internal Tax Act did not violate
the prohibition contained in Art. 14 of the Constitution and was
a valid piece of legislation because

(c) the nature provided again, under s. 3(1) A, had with regard to appeal, removal or otherwise the same right as one under s. 3(1) since notwithstanding the difference in the phrasing of the corresponding provisions in the two sections, i.e. "and" and "thereupon" the provisions of the

[illegible]

(3) the difference resulting from the fact that the post-earnings under a β_{it} is subject to a prescribed period of incubation while that under a $\beta_{it}(\Delta)$ was free from any such incubation fall within the limits of permissible statistical inaccuracy as the latter was meant for a special class of readers whose income during the war period amounted to a half of normal or more.

(The *Witness*: *Yes*)—that the additional words as if the person were a person sound similar [to *air*], [to *air*] were not superfluous and could not be compared with [to *air*] with the result that the procedure regarding approach etc. could not be available as an answer presented against under the latter section. The provisions of and the proceedings under s. 321A therefore attended art. 13 of the Constitution and were soundly made.

Observations of the Supreme Court in *Shree Mawanchi Mills Ltd. v. Dr. A. P. Patankar* have relied on by *Sanjour*, I explained on the ground that the relevant point therein was ignored and could not at all times be said to have been decided.

(b) (Unanimously) that the proceedings before the Income Tax Officer were no doubt judicial. It is however difficult to say how the Income Tax Officer may be said to have a bias or personal interest in the matter of assessment so as to vitiate the principles of natural justice that no one can be a judge in his own cause and even assuming it to be so the defect is cured by a process, for appeal and hearing before higher and wholly independent tribunals. Moreover the principles of natural justice cannot be invoked for attacking the validity of an administrative act to the contrary in the Act.

Dr. Robert A. Anderson is President and CEO of

	Page
Postoffice —Of Art. 1, of the Constitution applicable to a Govern- ment service against any claim amounting to a permanent disfranchisement is distinguished from a bona fide contract of postage under Art. 340 33	33
Public Revenue —As defined in s. 21 Indian Penal Code (the clause Railway services after the nationalization of railway undertaking is the consideration that s. 131(1)(g) provided that for the purposes of offences under Chapter IX, of the said Code every Railway service shall be deemed to be a public service 334	334
Proclamation made —Is a document if past dated and can be relied on as authentic 335	335
Railway Revenue —Whether and how far Public service —Pre- visions of Corruption Act, 1900 as s. 204, 210(2) and 210(4)—Indian Penal Code, 1860 as s. 409 and Ch. IX— Indian Exchange Act, 1910 as s. 11(1) and 12(1) 336	336
After the nationalization of railway, railway services become and are public services within the notion of s. 21 of the Penal Code and for the purposes of the Prevention of Corruption Act without any reference to the statutory forms prescribed by s. 131 of the Revenue Act and there is accordingly no reason to exempt it to offences under Chapter IX and s. 409 of the Penal Code Moreover the intention is to prevent where the offence is ques- tioned is covered by s. 2 of the Prevention of Corruption Act itself P. R. Chaudhary v. State of Uttar Pradesh 337	337
Rehearsal —By a Court or the High Court issuing a note for opinion—Codes s. 123 Civil Procedure Code—When to be made 38	38
Registration —Compulsory of a lease as an agreement to lease creating a present estate of immovable property from year to year or for a term extending into years under s. 13(1)(a) read with s. 5(1) Registration Act, 1908 36	36
Tidals —If ineffective or curable of seasonal interest there should be reference to grant 37	37
Bank Control and Revenue Office —Codes the U. P. (Ten- century) Control of Rent and Eviction Act, 1927—If such estate is not subject to control as the statute for ten- century under the Act by the District Magistrate as the Superior Administrative or Revenue Officer 405	405
Rescindable —Finding that this on facts needs of plaintiff in order 125—Whether operates as res judicata in subsequent suit—Code of Civil Procedure, 1908 s. 11 41	41
A suit for redemption of mortgage was dismissed by the trial court on the ground that the mortgage had not been proved. The appeal against this was dismissed on the findings being that	

the plaintiff was not the owner of the disputed mortgage and accordingly the mortgage was not established. In the such dispute was between the other parties and in respect of the same plea.

And that the finding of the appellate court on the first point in the matter was apparent as was indicated in the fact or more on the proper account of the matter in issue, the first point for determination at more than in the above result of the plaintiff and the finding therein cannot be said to be unusual or unnecessary.

See also: Mier v. Jovan Mier

Mortgage—Claims and recovery of.—Plus of lack of power to make sale.—Jurisdiction of Civil Courts, whether limited.—United Provinces Land Revenue Act, 1894 s. 103 (a).

The bar under s. 103(a) of the Land Revenue Act in the jurisdiction of the Civil Courts in matters connected with the claim or recovery of revenue or sums made payable in such does not apply in case of writ or writs for recovery of power or by the Government or authority concerned.

See: Pring Singh v. United Provinces Government

Mortgage—Before the Board of Revenue under s. 103, U. P. Zamindari Abolition and Land Reforms Act, 1948.—Not governed by the U. P. Tenancy Act, 1948, nor rules framed there under including r. 103, Revenue Manual.

Statutory jurisdiction of the High Courts.—Money and charge of as provided in s. 103, Civil Procedure Code, 1908.

Statutory power.—Of High Courts.—Under s. 103 Criminal Procedure Code, right—Exercise of in appropriate cases.—See note on information received.

Sale and non-purchase.—Duration of

The plaintiff, appellant and the defendant, opposite parties agreed as follows:

(1) That the defendant opposite party has taken a new Fixed Deposit Cycle with all the accessories on Rs. 100 in Rs. 1000 per month from the Allahabad Agency, Lucknow.

(2) That the latter will pay the hire as above within the first week of each month.

(3) That if the hire is not regularly tendered any benefit for a period of 12 months and when a sum upto of Rs. 100 has been paid the interest of hire paid will be credited in the money and the latter on a will automatically become the owner of the bicycle.

The opposite parties took the note and paid a sum of Rs. 100 as an instalment. The payment was then stopped and the plaintiff said to return Rs. 100 as hire money for 12 months. The defence was that the plaintiff could claim only the balance of the

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ages of 1914) which had been agreed to at the point of the sale after deducting payments already made. This defect was accepted and the trial even decreed the suit for 1914 only. A reason was find again, this order.

Held, that to determine whether the transactions amounted to a sale or a lease-purchase agreement, the test is whether a real option has been given to the alleged buyer to terminate the agreement at any time he likes.

If such an option is given to him, the transactions amounted to a lease-purchase agreement. If on the other hand there is no such option and the alleged buyer has to pay the entire amount the transaction is a sale.

Myers, Kumar Yarns v. S. P. Mehta

210

Sale-purchase.—Of old grain stock sold during the previous year. All can be included in the Agricultural income of the assessment year 1933/4 under the U. P. Agricultural Income Tax Act 1929.

211

Sales Tax.—Assessment year and previous year, definition of—U. P. Sales Tax Act 1928 v. 7 (prior to amendment in 1934). See clause 3, scope of.

Held, that it is wrong for the Sales Tax Officer to assess the liability of a firm to tax on the basis of its turnover for the assessment year in substance 3 of 4 of the U. P. Sales Tax Act provides that in assessing the tax on the basis of his judgment, the Sales Tax Officer shall take into consideration the turnover of the dealer for the previous year.

Shree Chakjee Ram Wool Cloth v. State

212

Sanction.—Of the District Magistrate necessary under s. 49 Indian Arms Act 1878 for possession under s. 19(1) of the said Act in the districts of Allah.

213

Statute of death.—Necessary to follow a coroner under s. 191 Indian Penal Code—Glasby v. Maudslayi.

214

Statute Judge.—Duty and power of while receiving evidence before the Commission Magistrate during preliminary enquiry as evidence in the Criminal trial under s. 428 Criminal Procedure Code 1908.

215

Statute Member, Board of Revenue.—Power of as clerk or secretary to deposit or order passed by the Board or any other member in proceedings under the Zamindari Abolition and Land Reforms Act 1948 not derived by the provisions of s. 148(3) U. P. Land Revenue Act 1901.

216

Status of a railway message.—That of a public servant under s. 4, Prevention of Corruption Act 1947.

217

Statute.—Interpretation elsewhere and when to be deemed past practice and when retrospective.

218

Statutory warranty—Enforced by provisions of a 1901 Transfer of Property Act (1884)—It available besides express contract of certain warranty in the case of breach of warranty of title

291

Stay in suit—Unauthorized application for adjournment by a Pleader without authority or an application for staying decree in part order not such—Application decided in map of suit regarding the same agreed to be decided through Arbitration process in 1902 Arbitration Act 1900

333

Stay in execution—Permission for granted by the Revenue Control and Revenue Officer—Power of District Magistrate in power of suggest execution of the same—United Provinces (Taxation) Control of Revenue and Revenue Act 1947 s. 2

The application for permission to stay for execution under s. 2 of the Control of Revenue and Revenue Act being refused by X, the Revenue Control and Revenue Officer, the applicant filed an application to the District Magistrate who sent it on to X with the direction: "Please reconsider the matter after hearing the parties, whoupon X gave a further hearing to the parties and granted the required permission.

Held that an order once passed by the Revenue Control and Revenue Officer cannot be cancelled or varied by the District Magistrate or by the Revenue Control and Revenue Officer acting under the direction or suggestion of the District Magistrate.

The District Magistrate cannot, as the matter, be used to be an officer superior to the Revenue Control and Revenue Officer. Moreover, the power of a superior administration or subordinate office is created and given his subordinates can, if available to him, be exercised before and not after the passing of an order.

Quere Whether the Revenue Control and Revenue Officer could review the order on his own initiative and as a result of the exercise of his discretionary and independent judgment.

Mineral Oil Co. v. Sri Ramesh Prasad

49

Suit on contract against Government—Yamunee, 1899—Objection as to competency of necessary whether and when may be raised for the first time in High Court—Code of Civil Procedure 1908 D. 111 s. 1 s. 10.

An objection as to power of law which does not involve or depend on questions of fact may be allowed to be raised for the first time at the stage of execution or appeal before the High Court.

The objection to the enforceability of a contract subject to the plea in fact of performance cannot, therefore, be allowed to be raised for the first time on appeal unless the plea is not at all available to the other party at the instance where the contract arose.

by the Government under s. 36 of the Code of Civil Procedure—
which is already contained and thus the scope of the protective
suit—does not entitle it rely on s. 36(1)(b).

U. P. Government v. Nathmal Gopal

320

Sugar Tax—Payable by an assessee with over Rs 15,000 annual
sugar income under the U. P. Agricultural Income Tax Act,
1939—If subject to the condition (b) in the Sugar Schedule
provided in Part I of the Act, 15% is the rate Agricultural
Income Tax shall amount half the amount by which the total
agricultural income exceed Rs 15,000

318

Supreme Court Appeals—Consolidation of, for purposes of fees
Order 13(1)(4)—Requirement of—Code of Civil Procedure
Order 13, 1908 s. 4—Consolidation of Suits 1938 Act 121 (4)
(a)

Of the 100 suits, persons suing out of the difference suit on
the basis of the different issues given in different persons, was
dismissed on the 5th October 1938 and the 100 suits dismissed on
the 7th October 1938 by a short order in each case. The
process is concluded by one order dated the 5th October in Civil
Suits Misc. No. 2814 of 1938. We therefore reject it.

In an application for the consolidation of these suits for the
purpose of summary judgment as agreed in the Supreme Court
under Art. 226(b) (c) of the Constitution—

And that the cases cannot be said to have been decided by the
same judgments and were therefore incapable of consolidation.

In suits involving substantially the same questions for deter-
mination (i) S. 13 s. 4 of the Code of Civil Procedure permits
consolidation if they are decided by the same judgments, and
infinite consolidation if they are decided by separate judgments;
and if separate judgments even though identical in terms be
issued in the same judgments, there would be little left of the
diversity envisaged in the two portions of the rule.

Shayam Singh v. Shriwan Das held obscure and therefore
no authority on the point.

Shri Lal v. Board of Revenue U. P.

343

Transfer—On for payment of duty the premium for out-
standing where the money under s. 104 Transfer of Pro-
perty Act 1882 for the purpose provided permission granted
by the Revenue Control and Excise Officer under s. 3 U. P.
Revenue Control and Excise Act 1939

341

Technical Compulsion—Order under s. 23 Code of Criminal
Procedure 1938 for production by its accused person of a
document as to possession and liability as to civil against
him—issued under Art. 23 (2) Constitution of India 1939

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(d) independent of such gain and a work which is either the single use of production or production will be covered by these two amounts. Further that the work would be production or production or either if it actually results in work or a work to be such. It is not necessary that in every case it must result in actual gain. If the work is such that it increases the value of the land, it will always be of a productive nature.

(e) this is order to find whether any expenditure comes under the above head or the two amounts or not, there are two things which are necessary—

(a) whether the work is either for the purpose of single use or production or production; and

(b) whether it was for the benefit of the land, if these two things are possible the expenditure would be exempted under the head, whether it results in extra income or not is immaterial.

(f) that while in a representation of the State Government, the Income-tax Board July 13 giving certain statements, the Board would be prohibited from charging any income tax over such sums, money which the Income-tax Board July paid in payment of rule 17 framed under the U. P. Agricultural Income Tax Act.

(g) that rule 17 framed under the U. P. Agricultural Income Tax Act, was not proposed to have been framed under s. 11 of the Act but a head being made under s. 44 of the Act and a having been laid before the Legislature and having been laid upon Board July by the Income-tax Board, who had derived advantage, it is not now open to the Board to have the law declared which was retrospective, to effect the gain and completed transactions having taken place at the time of that rule. The Income-tax Board have been directed if so far as to the extent, had occurred and the Board had derived under Board July income of the above rule.

(h) that the Explanation to rule 17 framed under the U. P. Agricultural Income Tax Act is not to be interpreted and applied independently of the rule and the Explanation to rule 17 is not applied by the rule itself.

(i) that the hospitals which were subject to general inspection by the Civil Surgeon, either as treated or hospitals or out-patient of a gain from the Government within the meaning of the head, came under rule 17 framed under the U. P. Agricultural Income Tax Act.

(j) that the two powers in rule 17 and rule 18 of s. 44 are mutually independent. The power under rule 17 is only a question that work can always be exempted, irrespective of the fact whether any income has been made under rule 17 or not.

(k) that if an amount is deemed to be exempted, it cannot be exempted by the Board if it is necessary to charge or pay

Page

other school, which is either recognized by the State Government or by any of the local authorities, then on that event it would amount to a donation to that institution within the meaning of rule 17 whether it is paid for the purpose of maintenance of the school, for payment of scholarships to students, for prize donations won at Jubilee celebrations or for any other purpose connected with that institution. But if the amount is paid directly to one donor, who may be the students of a recognized school, the donation would not come within the purview of rule 17 framed under the U. P. Agricultural Income Tax Act.

[146] that if the amount has been paid to an institution recognized by the State Government or a local authority through sanctioned for scholarships it would be a donation within the meaning of rule 17 framed under the U. P. Agricultural Income Tax Act, but simply because the student has been paid for scholar ship is an institution would not make the institution an aided institution within the meaning of rule 17.

[147] that sentence (3) in the schedule of rates is applicable to Part I estates and not to both the parts.

[148] that the knowledge of the order passed by the Revenue Board on the 24th March, 1945, in revenue applications nos. 125, 126, 127, 128, 129 and 130 of 1945 and its later amendments from a copy of the judgments obtained by the clerk of the court for the applicants, but not amount to communication in the nature within the meaning of the word as used in s. 17 of the U. P. Agricultural Income Tax Act and the application for reference consequently is not entertained.

Maharaja Wodekshwar Prasad Singh v. State

313

United Provinces Agricultural Income Tax Act, 1945 Schedule Part I paragraphs A and B clause (i).—

Held that the expression Agricultural Income in paragraphs (A) and (B) of Part I of the Schedule, in the United Provinces Agricultural Income Tax Act does not include sugar tax.

Raja Syed Mohammad Saadul Ali Khan v. State of United Provinces

148

United Provinces High Courts Enactment Order, 1945 of 1945 clause (i).— Case arising under the Order, meaning of.

Plots of land in respect of which Mohammedan rights were claimed and in respect of which the order of the Assistant Commissioner was made, were situated in District which was not one of the areas over which the Lucknow Bench exercised jurisdiction.

Held that the case, out of which the very petition has been set not arise within the area over which the Lucknow Bench

would require production under the provisions of clause 14 of the *Amalgamation Order*.

Books & Assets: Canadian General course
Project

201

University—Division for the Court of the University from the Domain Commission and from the Commission of Regulated Graduates—Memorandum to the Executive Council of the University—Terms to report by Ordinance—Ordinance 14th day of—*R. F. University Ordinance 1 of 1929*, relating to—*Removal of Affiliations (Fourth)* and (Fifth) Order relating to—*Commission of Order Article 14th scope of*

The *Ladouceur University Act* 1929 was amended by Act VI of 1929, which came into force on 19th March 1929. According to Act VI, members were to be elected for the Court of the University from amongst the domain and 20 members were to be elected from the Commission of Regulated Graduates and five members were to be nominated to the Executive Council of the University by the Chancellor.

Armand Tardieu, the petitioner was elected from the Domain Commission to a seat on the Court of the *Ladouceur University* on 14th August 1929 for a period of three years and his term expired on 14th August 1932. Sells North West was elected from the Regulated Graduates Commission as a member of the Court of the *Ladouceur University* on 14th August 1929 for a period of three years and his term expired on 14th August 1932. From Tardieu was nominated to the Executive Council on 14th October 1929 for a period of three years and his term expired on 14th October 1932.

The *Removal of Affiliations (Fourth) Order* amended the *Removal of Affiliations (Fourth) Order* to the extent that the authority conferred prior to the commencement of Act VI of 1929 shall continue not later than 19th January 1932, without violating the provisions of the Act or the Statutes in force before 14th May 1929. The effect of this order was that Armand Tardieu and Sells North West were no longer members after the 19th January 1932.

The Registrar of the *Ladouceur University* the respondent in a writ of *habeas corpus* for mandamus under the new Statute and Act VI of 1929 and issued 19th October 1932 on the last date for filing memoranda papers for the Domain Commission, for the last year October 1932, is the last date for filing memoranda papers from the Regulated Graduates Commission. Armand Tardieu and Sells North West, the petitioners filed separate writs previous on 14th and 16th October, respectively challenging the validity of the *Removal of Affiliations (Fourth) Order* of 1929. The mandamus of From Tardieu is dismissed by the *Removal of Affiliations (Fourth) Order* of 1929 issued on 14th

January, 1990 which determined all proceedings with effect from 1/01 January 1990. Pirm Nasser Tandon filed the writ process challenging the validity of the Removal of Detention (Breach) Order of 1990.

Article 14 that the U. P. Universities Ordinance no. 1 of 1990 in no way purports to affect the powers of the High Courts. It may have affected the rights of a party before the High Court but the powers of the High Courts have remained the same. If an Act is passed during the pendency of the case which affects the rights of the parties, it cannot be said that there has been any delegation from the powers of the High Courts which endangers the powers of that Court which by the Constitution it is designed to fill. The validity of the Ordinance is not affected on this ground.

(iv) that the Ordinance passed does not only affect the Lucknow University about which writ petitions are pending in this Court but it has also amended Aligarh Muslim Univ and Goolbagpur Univ laws Acts. It was promulgated on 1/01 June 1990 when the session of the University about themselves who going to start and that would be the right and proper time if any change was required to be introduced so that there may be a new setup of administration from the very beginning of the session.

Again from the fact that the amendments in which an Order cannot be passed is not justifiable that Ordinance cannot be created as by a mala fide act.

(v) that it is only when a Statute does not specify and in clear words take away vested rights that a Statute will be deemed to be prospective. It is open to a legislature to take away a vested right by legislation particularly if it has been vested by a legislative enactment.

(vi) also that there are clear words in the Ordinance which show that they are of a retrospective nature and they take away the rights of the petitioners.

(vii) that after coming into force of this Ordinance the petitioners have no rights left and the petitions must be dismissed.

(viii) that Universities are autonomous bodies and the courts should be reluctant as far as possible to interfere with the internal administration of the Universities. There should be no reasons for non interference unless there is a palpable violation of law which has amounted to grave or a flagrant violation of law. The rights of the petitioners in a writ which needed no intervention by the High Courts when their writs were filed, is denied.

Voluntary Assembly—Common object of—Tow-Weapons and
crucifix material

19

Utah Probate Jurisdiction, Abolition and Land Reforms Act,
chap. 2, §§ 11-13, 14-15 (3) and 16—Issue remaining—*See* *Probate*
non-Collector issue—*See* *Probate Code* 1921
c. 113—*See* *Appellate when competent*

A Collector or an Assessor, Collector has no jurisdiction to
act in judgment on the merits of the land claim entered on map
in the Collector and has to decide that case in accordance with
the provisions of section 10 and 11 of c. 113 of the Utah
Probate Jurisdiction, Abolition and Land Reforms Act.

An opinion, under c. 113 Civil Procedure Code, is to be sought
when the court will hear some dispute about the opinion and
not when the court has formed an opinion and acted upon it
and that opinion is designed with by another court.

See *Case v. Mahabehian* 1921

21

Voluntariness—In favor of a contract—When a contract void

22

Vote right, if and when can be determined by the Legislature

23

Vote—Power of court to declare any particular person—*See*
Vote on

25

Warranty of title—Express warranty of warranty for breach of
title of the right and liability under the warranty cover
and—*Transfer of Property Act* 1921 c. 113

The express warranty for the title of title consideration, as
one of warranty dispositive from the property sold, but when it
warranty title does not depend the warranty of title right to title of
warranty on the warranty warranty covered by c. 113 of the
Transfer of Property Act and cannot be enforced for the warranty
warranty paid in consideration the title for possession of that
property by persons entitled to it.

When the vendor is a party to the law as consideration and
provides to allow it to conclude on party to legal from warranty
issue on or with of the warranty of title dispositive matter to have in a
warranty against independent warranty.

See *Warranty v. Title*

26

Warranty of title—Covering warranty—*See* *Warranty*
on an existing contract of a warranty of title—*See* *Warranty*
Code 1921, chap. 113

The plaintiff filed a suit for declaration of title to some part
and the reason of the suit depended upon the fact of a
will by one of the existing contract to the will was won over by
the defendant.

The plaintiff believed that he was proved upon the evidence
to be honest and truthful and that he was to be successful in

proving the will by the production of the same. The plaintiff therefore applied for the withdrawal of the writ with liberty to bring a fresh writ on the same claim of intestacy which was permitted the said withdrawal of the writ. A decree was filed against the above order.

And (c) that the plaintiff was bound with an obligation of producing such evidence as the law required under the statutes, provisions of s. 68 of the Indian Evidence Act and the decree was in the nature of a final decree.

(d) That the powers of the High Court in revision are not available for correction of errors of law, however gross these errors may be and wherever may be the results of these errors on the merits of the case.

(e) Further that the exercise of revisional powers by this Court are discretionary and the High Court can refuse to exercise that discretion, unless there was likely to be some substantial failure of justice and on this date a decree is said that unless the order of the court below is set aside there was any failure of justice much less a substantial failure thereof, and unless the plaintiff is prima facie entitled to establish her case with liberty to bring a fresh case later on it was held that was likely to suffer inequity and not the defendants.

Shri Kuntal Devsinh v. Shri Thakuraj Mathuraj Bhatnagar

Will—Maintenance—Change in Property—Interpretation of the Will—Indian Succession Act 1925 s. 271 except d'

Ram Bhatnagar died in 1928 leaving some property and was succeeded by his widow who also died six months later and his mother the plaintiff Ram Puri became the owner of half of same (b) and with (c) and was (d).

On 11th December 1924 Ram Puri surrendered all her rights in house of her mother-in-law Shri. Tula retaining in herself a right of residence and a sum of Rs. 20 per month for her maintenance which was made a charge upon the property.

On 22d February 1928 Tula executed a deed of relinquishment of the property surrendered by Ram Puri the plaintiff, in favour of her husband Datta Das who became owner of a moiety of the charge. On 22d May 1928 Datta Das executed a will disposing of the entire property. Datta Das died. Shri. Bhatnagar then died in 1936. On 12th December 1941 Ram Puri filed a suit for Rs. 2000 as the sum of Rs. 200 per month from 22d December 1928 to the date of the now under the deed of relinquishment executed by her.

Held: that partly from the fact that a large amount was given for ground to Ram Puri, the plaintiff it cannot be inferred that it appears from the will that the legatee wanted to discharge the debt by giving the legacy.

Ram Puri v. Shri. Bhatnagar

Work in public stations—Only necessary preliminary or excluding—may have a compulsory space where the thing to be done is for public benefit or in advancement of public justice.

4.

Workmen's Act—*Course of employment*—*Accident*—*Place of accident*—*Course of employment*—*Meaning of*—*Compensation*—*Workmen's Compensation Act, 1925* s. 12 and 13(1) scope of—

Union the respondent was a member of the Railway Cooks' and Firemen's Union. On September 2, 1922, when he was at his quarters, he was attacked by the danger when there were in the wagon and he sustained injuries on the left hand and right eye. He claimed compensation under the Workmen's Compensation Act, claiming that he got the injury in the course of his employment and arising out of it. The defense was that the respondent was not at work on that day and was not, in the course of employment, and also no injury is required under s. 12 of Act was given within a reasonable time.

The Workmen's Compensation Commission found that Union member injured at his eyes as an emergency with persons who wanted him to violate the prohibition of the Railway Authority. Union through an ink from him in the Railway quarters in the capacity of a workman, and sustained injuries as such. Railway was awarded as compensation to Union the wages due. The Railway has come as appeal.

Art. 1 that although s. 12 of the Workmen's Compensation Act is mandatory with regard to the issue of the accident to be given in the manner provided, under the Act but the effect of the mandatory provision is greatly weakened by subsequent provision to that effect, namely, which provides the issue of the injury or irregularity in a case shall not be a bar to the enforcement of a claim if the employer or any one of several employees or any person responsible to the employer for the management of any branch of the trade or business in which the injured workman was employed had knowledge of the accident from one other source in or about the time when it occurred and the issue of injury in the present case is not fatal to the claim.

(2) also that the Commission may receive and decide any claim in compensation if he is satisfied that the failure to give the issue or prove the claim was due to sufficient cause.

(3) that if a person is on duty he is not supposed to do his work and could not otherwise be on duty and in the instance that the work place during the course of the employment of the respondent he is not entitled to lay any claim against the railway.

Deceased Superintendant Northern Railway Board, that is Union.

Workmen and employees—*Claim for compensation*—*Death*—*First Railway through as General Manager*—*Whether employee*—

669

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*purports of a claim by the railway service—Horthorn v Com-
pensation Act, 1925 ss 3 and 10—Code of Civil Procedure
1908 s 76*

Nothing regard to the scheme of and the definition under the
Workmen's Compensation Act is denied except that a claim by
an ex-tenant of a railway service against the Railway through its
General Manager is a claim against the employer and is maintain-
able in such a claim, to enforce the employer's liability under
s. 3 of the Act cannot be said to be a suit under the Code of Civil
Procedure as it is a contract and is defined by the provisions of
s. 23 of the Code

Rajagani Singh v The Great Indian Railway

309

*Will—Common Order—Joint or Separate Will Application—
Scope of*

Held that a will petition can be filed only by one unless the
rights are joint and inseparable. In the case of a common right
it is not open to the persons who are affected by a common order
to file a joint will application

*Uma Shankar Rai v Divisional Superintendent,
Northern Railway Ludhiana*

311

*Tamada, Shalika—Rolls Booked—therefore, as the Act
relates to compensation—Amendment of the Rolls 1904 s 1—
Amendment of—May vary with the other matter of the order
making scope of—Under Proviso demands alteration and
last sentence Act and Rules rule 33—rule rule (1)
applicability of*

Held (a) that where after the rolls have been finalized the law
is amended they under the law itself provides that it shall have
retrospective operation and further any rolls already finalized shall
also be amended accordingly it will not authorize the authority
concerned to effect any changes much less restrict him in the ex-
ercise the power of removing any mistake or error. The proviso
added to subrule 1 of rule 33, B does give a retrospective opera-
tion

(2) also that where the payment of a sum of money happens
in turn out of the status rule and as a result of which the inter-
ference to the ultimate status gets no compensation, therefore
it will not enable the State to deduct the money made in the name
of future status belonging to the intermediary which too might
have been assigned and the ultimate made in the Compensation
Amendment Bill by the Compensation Office reducing the
amount on the same basis is ultra vires and without jurisdiction

Raja Raja Prasad Singh v State of Uttar Pradesh

313

*Ramabhai Datta Mathuram Raj—applicability of—of it can be
taken under s. 47 of the Civil Procedure Code before the
Revenue Court*

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CRIMINAL REVISION

Before Mr. Justice Mulla and Mr. Justice Nigam *

LAKSHMI NARAIN

1933

April 29

STATE

Criminal Revision—Criminal Process—Hunger strike—Prison Act 1894, ss. 3 (f) and 32 and Jail Manual Chapter XXIV, para 742 and Chapter XXII, para 308, scope of—

Held, that the act of going on hunger strike is an offence under para. 742 of the Jail Manual and is punishable under s. 32 of the Prison Act provided the accused was a prisoner under s. 3 (f) of the Prison Act.

Where the accused repeatedly refused to take food to seek a reduction in his supposed punishment it must be held that the accused was on hunger strike and his case falls under para. 742 of the Jail Manual.

(a) Para. 742 of the Jail Manual does not exclude the operation of its provisions against those who had already started hunger strike inside the jail but who continue it after coming to jail. Hunger strike has been made an offence by the Jail and the act of hunger strike per se does not constitute an offence.

Where the accused was committed to jail on the basis of an order issued by a proper authority and was because he went on hunger strike, but while in jail he was on hunger strike, then his case falls under s. 32 of the Prison Act for he constituted a breach of the rules framed for maintaining discipline in jail.

(b) Also that every breach act of refusal to take food at the time when meals are given to prisoners in jail would constitute a fresh offence.

Criminal Revision No. 74 of 1933 against an order of B. N. Chaudhary, Sessions Judge, Lucknow dated 13th January 1933.

The facts appear in the judgment.

N. N. Maitra for the applicant.

The Additional Government Advocate (P. M. Chaudhary) for the State.

The judgment of the Court was delivered by—

MULLA, J. —This is a criminal revision filed by Head Constable Lakshmi Narain who belonged to the armed police. He was sent to jail on the 4th of November 1932. It seems to us that the applicant along with

*Sitting in Lucknow.

194 some other police were wanted to have a review of our
 195 the grievance and the applicant and his companions
 196 went on hunger strike on the 1st November 1967, while
 197 they were still outside. When the applicant came to
 198 the jail he continued his hunger strike and as a means of
 199 required strategies made by the jail authorities to per-
 200 suade him to take food he refused to do so. The jail
 201 authorities warned the applicant repeatedly that this is a
 202 major offence against jail discipline and the Superintendent
 203 (Jail) also persuaded him on some occasions in order
 204 to persuade him to give up his hunger strike. These
 205 attempts, however, proved unsuccessful and finally the
 206 Superintendent (Jail) felt that he could not adequately
 207 punish the applicant for this continuous breach
 208 of jail rules and discipline and, as he submitted, a
 209 report to the Inspector General of Prisons. The In-
 210 specter General of Prisons after perusing the report came
 211 to the conclusion that it was a fit case in which the appli-
 212 cant should be prosecuted under section 32 of the Pri-
 213 sons Act. A complaint was accordingly filed and after a
 214 trial before a Magistrate the applicant was convicted
 215 under section 32 of the Prisons Act. The sentence
 216 awarded to the applicant was six months' imprisonment
 217 (contempt).

After his conviction the applicant went up in appeal
 but his appeal was dismissed. He then filed an applica-
 tion of review before the Court which came before one
 of us and as it was considered that some important aspects
 of interpreting the relevant law were involved it was
 ordered to be placed before a Divisional Bench of this
 Court. It has come before us to-day in pursuance of
 that reference.

The provision for punishing a prisoner under
 section 32 of the Prisons Act if he goes on hunger strike,
 is made in paragraph 742 of the Jail Manual under
 Chapter XXVIII. Paragraph 742 runs as follows:

Prisoners who go on hunger strike shall be
 warned that no request for the address of any of
 their alleged prisoners shall be considered as
 long as the strike continues, that hunger strike is

a major jail offence that a man hunger-strike amounts to mutiny and that hunger-strikers are liable to be punished either departmentally or by prosecution under section 52 of the Prisons Act, 1894, (IX of 1894) under which they may be sentenced to imprisonment which may extend to one year.

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Lahore
Manual
of
Prison
Management
p. 2

A hunger-striker should not ordinarily be prosecuted under the Prisons Act without the previous sanction of the Inspector General.

There is another paragraph in the Jail Manual the relevant part of which we quote at this stage. That paragraph is 105 in Chapter XXX of the Jail Manual.

In addition to acts declared to be Prison offences under section 48 of the Prisons Act 1894 (IX of 1894) the following acts are forbidden and every prisoner who wilfully commits any of the following acts shall be deemed to have wilfully disobeyed the regulations of the prison and to have committed a prison offence within the meaning of sub-section (1) of the above section of the act. (17) refusing to eat food or the food prescribed by the prison diet scale.

In view of the two paragraphs quoted above it cannot be doubted that as the universal maintaining discipline in jails the refusal to take food by a prisoner has been made an offence. One can understand why it has been made an offence for if prisoners refused to take food it is bound to adversely affect the discipline which has to be maintained in jails and jails are not places where people can have their own choice of food on their own choice in other matters. A prisoner on hunger-strike will attract sympathy from other prisoners and this may lead to acts of indiscipline being committed on a mass scale and may even lead to mutiny. This obviously can not be permitted. We are therefore satisfied that the act of going on hunger-strike is an offence within the meaning of paragraph 742 of the Jail Manual and is punishable under section 52 of the Prisons Act.

(S.S.)
[Lambert
Hend-
on
v.
State,
1957.]

There are, however, certain other questions which arise in determining the guilt of the applicant in this case. The first fact which should be proved in such cases is that the accused was a prisoner within the definition given under section 3 (2) of the Prison Act. We are at the moment concerned only with a criminal prisoner and this phrase has been defined as follows:

Criminal prisoner means any prisoner, duly committed or committed under the writ, warrant or order of any court or authority exercising criminal jurisdiction or by order of a court, named

The prosecution examined Sir Thomas, the Superior Justice of the Peace, who deposed that the applicant was an under-sail who was admitted to jail on the 14th of November 1957. This in itself would not have been sufficient to prove that the applicant was a criminal prisoner. In the definition cited above it is clearly mentioned that only that person can be called a criminal prisoner who is admitted to jail on the warrant or order of any court or authority. Obviously if the applicant was admitted to jail on the basis of such a warrant or order it would be proved on the papers, such as the jail authorities and it should have been produced by the prosecution to prove that the applicant was a prisoner. This warrant of removal to jail custody issued by a competent Magistrate was not produced in this case. Under the circumstances it would have been difficult to accept the oral statement of Sir Thomas regarding the contents of a document which was within his possession and which was not placed before the court. It is not one of those cases where primary evidence could have been disposed of with and secondary evidence was permissible. We however find that a question was put to the applicant when he was examined under section 342 Criminal Procedure Code and he admitted that he was an under-sail prisoner who was admitted to jail on the 14th November 1957. We think that on the basis of this admission made by the applicant we can safely accept that the applicant was a prisoner within the meaning of para-graph 342 of the Jail Manual.

The next question to be determined is whether the applicant was on hunger strike as alleged by the prosecution or he merely refused to take food. It is only when a prisoner goes on hunger strike that he can be prosecuted under section 52 of the Prisons Act, and mere refusal to take food even on repeated occasions will not by itself turn that refusal into a hunger strike. It is only when this refusal is meant to be used as a weapon for seeking redress of grievances that it assumes the character of hunger strike. The prosecution produced no evidence on this point but here again the applicant when questioned under section 542 Cr. P. C. stated that he had given up taking food since the 1st of November 1957 and he had done so in order that certain grievances should be redressed. In Webster's New International Dictionary, Volume 1, Second Edition, "hunger strike" has been given the following meaning:

The action of one especially a prisoner, who refuses to eat anything or enough to sustain life so as to obtain compliance with his demands or for release.

We are satisfied that on his own admission the applicant repeatedly refused to take food not because of some other reason but because he wanted to seek a redress for his supposed grievances. These grievances need not be related necessarily to the treatment meted out to a prisoner in jail or to a period of time subsequent to his admission in jail. The refusal of the applicant to take food on the 1st November 1957 and the 1st of November 1957 in jail was therefore an act of hunger strike and not merely an act of refusal to take food. We are therefore satisfied that the applicant was on hunger strike and so his case falls within the scope of paragraph 742 quoted above.

The last question to be decided is whether the applicant could be prosecuted under section 52 of the Prisons Act because he had continued to remain on hunger strike. The learned counsel for the applicant contends that the words used in paragraph 742 indicate that the

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prisoners who go on hunger strike can be prosecuted but not those prisoners who were already on hunger strike before they were admitted to jail and merely continued to remain on hunger strike. We have considered this contention and we have come to the conclusion that in the context the words go on hunger strike include remaining on hunger strike. It was conceded by the accused that hunger strike is a continuing act: a bit this a bit, every fresh act of refusal to take food at the time when food was offered to him would amount to a fresh act of hunger strike. This would amount to one going on hunger strike on that occasion. Every one knows that at least two meals are provided to a prisoner daily and therefore there would be at least two times every day when the offender can be said to have gone on hunger strike. The words of paragraph 742 do not exclude the operation of its provisions against those who had already started hunger strike outside the jail but who continue it after coming to jail. It is open to a person to go on hunger strike for the State has not made it an offence. It was open to the State to declare an act of hunger strike to be an offence within the meaning of section 309 Indian Penal Code but the State has not elected to do so. It can, therefore, safely be held that the act of hunger strike *per se* does not constitute an offence. If a person is removed to jail merely because he has gone on hunger strike and then after placing him inside the jail the jail authorities prohibit him under section 32 of the Prison Act obviously such a prohibition would be a legal and a reasonable manner, be maintained in such circumstances. In such a case the accused would not be a prisoner within the meaning of section 3 (3) of the Prison Act. It is true that in common parlance the term prisoner is applied to any one who is deprived of his liberty and detained in prison but for the purpose of the application of the provisions of the Prison Act the provision must point that this detention was legal and it was imposed by a competent authority on the basis of an offence charged against the accused and it was not in violation of Article 20 (2) of the Constitution of India. The executive authority cannot be given the

opinion of punishing a person for going on hunger strike by shutting him up in jail and turning him into a prisoner. But for the admission of the applicant himself we would not have suspected that he was a prisoner. The applicant did not challenge the validity of his detention in prison and so we have to accept that he was legally detained. But when a person goes on hunger strike and he has also committed some offence on the basis of which he was rightly sent on a criminal warrant to jail custody, then it cannot be pleaded by him that because he had started hunger strike, either he can ignore the rules of jail discipline. The issue is whether the offender was brought to jail because he went on hunger strike or because he committed some offence. If his entry into jail is on the basis of some offence, then this plea is not open to him that as he did not start the hunger strike in jail so he can continue to be on hunger strike and thus commit a breach of the jail discipline rules. What is permitted to a person is not permitted to a prisoner. A person is entitled to lead his own life outside the jail so long as he does not commit any offence, but a prisoner has to submit to jail rules as the measure of discipline. The prisoner cannot be permitted to turn a jail into a hospital or a forum of agitation whether political or otherwise. In this case we are satisfied that the applicant was admitted to jail on the basis of an order issued by a proper authority and not because he went on hunger strike. His case therefore falls under section 32 of the Prisons Act for he committed a breach of the rules framed for maintaining discipline in jails.

Another contention advanced by the counsel for the applicant was that as the report submitted by the Superintendent of Jail to the Inspector General of Prisons seeking his sanction, he has mentioned that repeated warnings and jail punishments were given to the applicant before sanction was sought. The counsel has contended that under paragraph 742 it is not open to the jail authorities to punish the applicant twice, first by inflicting those punishments which could be awarded to the applicants by the jail authorities and then by seeking a

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arrested and prosecuting him under section 32 of the Prison Act. In our opinion, this contention is also not maintainable. We have held above that every fresh act of refusal to take food at the time when meals are given to prisoners in jail would constitute a fresh offence. It seems to us that the jail authorities here tried to bring the applicant to reason by awarding only jail punishment, but he persisted in his hunger strike and committed a fresh offence repeatedly. No punishment was awarded to the applicant for these fresh offences, for the jail authorities came to the conclusion that they could adequately punish him. It was then that they sought the sanction of the Inspector General of Prisons for his prosecution. We are, therefore, of the opinion that the applicant is not being punished twice for the same offence committed by him. *Dismissed.*

The trial court sentenced the applicant to six months rigorous imprisonment. This in our opinion, was an extremely severe sentence which was not justified at all, but we find that the applicant has undergone the punishment and so we cannot give him any relief by reducing the sentence awarded to him. No fresh application was presented on his behalf either before the appellate court or before this Court.

The application of revision is, therefore, dismissed.

Applicant dismissed.

APPELLATE CIVIL

Before Mr Justice Tandon*

C P MEHRA (Defendant)

V

SAROJ K. K. MEHRA (Plaintiff)

1958

September
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Case set for an appeal dismissed for non payment of court fees—
C. P. C. 1908 Order XII rule 12 sub-rule 4 scope of—
Dismissal for default—meaning of

Field that Order XII rule 12 sub-rule 4 C. P. C. provides for those cases only where an appeal is withdrawn or dismissed for default. Rejection of an appeal for non-payment of court fee is not a dismissal for default of the appeal and consequently a cross-objection cannot be heard and dismissed after the dismissal of such an appeal.

Aradh Narain Singh v. Balu Prasad Singh (2)

U. Das v. Manoj Das Gupto (3)

Krishnan Jena Choudhary v. Kanchi Mahabir Das Mahapatra (5) relied on

(*Paper*) *Aradh Singh v. (Paper)* *Pradip Singh* (1) dismissed.

First Appeal no. 31 of 1957 from a decree of Dyk Dargah, Civil Judge of Lucknow dated 19th March, 1952.

The facts appear in the judgments.

P. N. Mathur for the appellant.

K. H. Sanyal, *D. N. Bhattacharya* and *S. N. Bhattacharya* for the respondent.

Tandon, J.—In this case the office pointed out on 14th July 1958 that there was deficiency in connection with the memorandum of appeal to the extent of Rs.1125. The deficiency report was made *quarta* because on 1st April 1958 the appellant was offered two months time to make good the deficiency. The appellant failed to deposit the necessary deficiency and proposed at one time to pursue the appeal on *forma pauperis*. But on the last hearing, this is on the 1st

Singh v. Bhattacharya

(1) 1958 F. L. R. 3 Supp. 109

(2) 1947 A. W. R. 1223 (12)

(3) A. J. R. 1949, Supp. 104

40 A. J. R. 1951 Supp. 113

the case of non-prosecution of an appeal by non-paying the court fee asked to be paid by the court. In that case the memorandum of appeal was found to be defectively stamped. Accordingly the District Judge asked the appellants to make good the deficiency. The appellants did not do so and ultimately the District Judge rejected the appeal and also dismissed the cross-objections which had been filed before him. On appeal the High Court held that the non-payment by the appellants of the court fee was tantamount to non-performance of an act necessary for the further progress of the appeal and the consequent rejection of the appeal was really its dismissal for default.

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This case no doubt supported the respondents' contention. Sub-rule (4) of Order XLII rule 22 reads as follows:

(4) Where, in any case in which any respondent has under this rule filed a memorandum of objections, the original appeal is withdrawn or is dismissed for default the objections so filed may nevertheless be heard and determined after such notice to the other parties as the court thinks fit.

The words used are 'is withdrawn or is dismissed for default'. Obviously the rejection of an appeal for non-payment of court fee cannot be said to be withdrawal of the appeal. Unless the expression 'dismissed for default' can be said to include the rejection of an appeal for non-payment of court fee the respondents cannot benefit by the sub-rule. There is nothing either in sub-rule (4) itself or in any other part of rule 22 to justify the giving of an extended meaning to the words 'dismissed for default' so that it may include the case of rejection of an appeal also. That has not been contended by the learned counsel for the respondents who has however contended that the non-performance by an appellants of an act required to be done by him is a default by him, hence the termination of an appeal in those circumstances is actually its dismissal for default.

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XXI, rule 1

the terminology employed by the Civil Procedure Code in describing the particular order whether as rejection of the appeal or as dismissal for default is of no legal consequence. The Code has, as need hardly be pointed out, used two different expressions for indicating the type of order the court shall make in particular circumstances because something required to be done by an applicant has not been done by him. These are: rejection of appeal or dismissal for default: for example see Order XXI, rules 3 and 13 and Order XXI rules 17 and 18. There does not therefore appear any justification why if the Legislature wanted that the words "dismissed for default" should include the case of rejection also, it should have intended to make that provision. When different words are employed for describing the result in any set of circumstances the usual rule of interpretation is unless a contrary intention is necessarily implied, that a different effect is intended in each case. That is what is rule 22(4) the words "dismissed for default" the Legislature must be presumed to have provided for those cases only which have been so described in the Code. With due respect I am unable to agree with the view held by the Madras High Court in *Aytha Reddi v. Govt* (1) referred to above.

The applicant invited reference to the case of *Abdulla Vazir Saigh v. Abdul Prasad Saigh* (2) decided by the late Chief Court of Madras in which the Madras decision was not followed. That was a two Judge decision in which the question, as the first Judge was exhaustively examined after receiving the case law from the various courts. The reasons which persuaded the learned Judges in rejecting the view held in *Aytha Reddi v. Govt* (1) briefly were that the provision is rule 22(4) of Order XXI which was in the nature of an exception to the general rule that to be considered strictly and not extended beyond its obvious meaning. And since the words used are "dismissed for default" the exception will benefit those cases only which have been thus branded by the Code. Reference may be made to para 102, 103,

(1) A.I.R. 1951 Mad. 513.

(2) 1952 A.M.L. 125.

U. Sin v. Mang. The Gyar (1) and *Kishore Sen v. Chaudhri v. Naigal, Mandlath Marwadi (2)* relied upon in the above decision. In the latter case the learned Chief Justice of the Bombay High Court observed:

In my opinion, it is quite clear that if an appeal is rejected for non-payment of court-fee, cross objections must fail with the appeal. Sub-rule (4) of rule 22 provides that when an appeal is withdrawn or dismissed for default, cross objections may be proceeded with; but where an appeal is rejected in default, in my opinion, be said to be withdrawn or dismissed for default.

I entirely agree with the view expressed in the above said three cases. Sub-rule (5) has already provided for those cases only where an appeal is withdrawn or dismissed for default. Rejection of an appeal for non-payment of court-fee is not dismissal for default of the appeal. The respondents cannot therefore successfully urge that the cross objection has been brought in; the rejection of the appeal is to be treated and dealt with on merits. It now must be rejected and I order accordingly.

Cross objection rejected.

SUPREME COURT APPELLATE CRIMINAL

*Before Mr. Justice Fazlul Hoque, Mr. Justice Das and
Mr. Justice Krippl*

MIZAJI AND ANOTHER

v.

STATE OF UTTAR PRADESH

[ON APPEAL FROM THE HIGH COURT AT ALLAHABAD]

Indian Penal Code, 1860, s. 148 (Offence punishable—Abuse—Common object of the unlawful assembly—Fire—Weapons and certain material—Section 148—Two parties—Disturbance, between—

By s. 148 Indian Penal Code, if an offence is committed by any member of an unlawful assembly in prosecution of the

(1) (1944) 1 L.R. 18 May 1944

(2) AIR 1944 Bom 342

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K. Mizaji
Fazlul Hoque

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common object of that assembly or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who at the time of commission of that offence is a member of the same assembly is guilty of that offence. Where the appellants were on a busy street with loaded weapons with the common object of taking forcible possession of land which was in possession of others, it may well be that the appellants fired a pistol in the presence of another member of the universal assembly and killed the person in possession.

Maid that the offence of murder must be held to be more directly contemplated than is an direct prosecution of the common object of taking forcible possession by the universal assembly.

Maid further that the members at any time must be held to know that the murder was likely to be committed in contemplation of the common object.

Consequently the case fell under s. 149 Indian Penal Code and all the appellants were guilty of murder.

Maid further that s. 149 Indian Penal Code is in two parts. The first part of the section applies where the offence committed is not an direct prosecution of the common object, it is an direct prosecution of the common object of the assembly.

The second part of the section applies where the offence committed is not an direct prosecution of the common object but the offence was such as the members knew was likely to be committed in prosecution of the common object of the assembly.

Queen v. Abdul Ah (1) and *Chakrasengh Gunde v. State of Mysore (2)* referred to.

Criminal Appeals nos. 81 and 82 of 1958 arose on order of the Allahabad High Court dated 27th February 1958 in Criminal Appeal no. 1289 of 1957.

The facts appear in the judgment.

In Capital Sentences Senior Advocate (B. C. Mohan, Advocate with him), for the appellants.

G. C. Mishra and C. P. Lal Advocates for the respondents.

The following judgment of the Court was delivered by—

KARMA, J. —These are two appeals which arise out of the same judgments and orders of the High Court in

Alfahabad and involve a common question of law. Appellants Tej Singh and Mungu are father and son, Bahadur is a nephew of Tej Singh. Madhu is Tej Singh's cousin and Munda was a servant of Tej Singh. They were all convicted under section 302 and with section 149 of the Indian Penal Code and except Mungu who is sentenced to death, they were all sentenced to imprisonment for life. They were also convicted of the offence of rioting and because Tej Singh and Mungu were armed with a spear and a pistol respectively, they were convicted under sections 348 of the Indian Penal Code and sentenced to three years rigorous imprisonment and the rest who were armed with lathis were convicted under section 147 of the Indian Penal Code and sentenced to two years rigorous imprisonment. All the sentences were to run concurrently but Mungu's term of rigorous sentence was to come to an end after he was hanged. Against the order of conviction the appellants took an appeal in the High Court and both their convictions and sentences were confirmed.

The offence for which the appellants were convicted was committed on 27th July 1937 at about sunrise and the facts leading to the occurrence were that field no 1988 known as Bahkhan field was recorded in the revenue papers in the name of Bahadur who was recorded as a possessor in tenure in district Buxar since in 1942 he mortgaged this plot of land to one Lakhmi Singh. In 1932 this field was shown as being under the cultivation of Ramachand, the deceased and four other persons Ram Swarup who was the uncle of Ramachand, Jai Lal his brother, Sita Ram and Saldan. The record does not show as to the title under which these persons were holding possession. The mortgage was redeemed some time in 1933. The defence plea was that in the years 1854, 1855, 1856 possession was shown as that of Bahadur. But if there were any such entries they were corrected in 1924 and possession was shown in the revenue papers as that of Ramachand and four others. Subsequently these entries showing contrasting possession of the deceased and four others were continued in 1937. On

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14th April 1957 Barwari sold the field no 1056 to Tej Singh appellants who made an application for mutation in his favour too, that was opposed by the deceased and four other persons whose names were shown as being in possession. In the early hours of 25th July 1957 the five appellants went armed as above stated. Musap paid a visit to have been in the field. (Sister of his dead). A plough and pluck broken as postle and bullocks were also brought. The disputed field had three portions, in one sugarcane crop was growing as the other two had been sown and the rest had not been cultivated. Musap started ploughing the lower field and commenced the joint sown sugarcane field. Tej Singh with his four boys watch Subedar P M 7 seeing what was happening gave information of that to Ram Swarup who accompanied by Ramchander Jadhav and Dural came to the Subkhan field but observed Ram Swarup squared of Tej Singh as to why he was farming on his field and Tej Singh replied that he had purchase of the field and therefore would do what he wished to, which led to an altercation. Thereupon the four persons cutting the sugarcane crop i.e. Musap, Subedar Michael and Musap came to the place where Tej Singh was and upon the instigation of Tej Singh Musap took out the pistol and fired which hit Ramchander who fell down and died half an hour later. The accused after Ramchander fell down fled from the place. Ram Swarup, Jadhav and Dural then went to the police station Maesahpur and Ram Swarup there made the first information report at about 7.30 a.m. at which all the five accused were named. When the police searched for the accused they could not be found and proceedings were taken under sections 47 and 50 of the Code of Criminal Procedure but before any process was issued Subedar Tej Singh and Michael and Musap appeared in court on 3rd August 1963 and Musap on 14th August 1967 and they were taken into custody.

*The prosecution relied upon the evidence of the eye witness and also of Bhandari who carried the rifle across to the party of complainant as to the coming of

Taj Singh and others. The defence of the accused was a total denial of having participated in the murder and as a matter of fact suggested that Rameshwar was killed in a dacoity which took place at the house of Ram Sarup. The learned Sessions Judge accepted the story of the prosecution and found Ram Sarup to be in possession of the field. He also found that the appellants formed an unlawful assembly, the common object of which was to take forcible possession of the field and to meet every eventuality, even to the extent of causing death if they are interfered with in their taking possession of the field, and it was in prosecution of the common object of that assembly that Mung had fired the pistol and therefore all were guilty of the offence of rioting and of the offence under section 302, read with section 148, Indian Penal Code. The High Court on appeal held that the appellants were members of an unlawful assembly and had gone to the Sakhia field with the object of taking forcible possession and

there is also no doubt that the accused had gone there fully prepared to meet any eventuality even to commit murder if it was necessary for the accomplishment of their common object of obtaining possession over the field. There is also no doubt that considering the various weapons with which the accused had gone armed, they must have known that there was likelihood of a murder being committed in prosecution of their common object.

The High Court also found that all the appellants had gone together to take forcible possession and were armed with different weapons and taking their relationship into consideration, it was unlikely that they did not know that Mung was armed with a pistol and even if the common object of the assembly was not to commit the murder of Rameshwar or any other member of the party of the complainant, there can be no doubt that accused fully knew, considering the nature of weapons with which they were armed, namely, pistol and lathis, that murder was likely to be committed in their attempt to take forcible possession over the disputed land. The

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High Court further found that the accused had gone prepared if necessary to commit the murder in possession of their common object of taking forcible possession. They accepted the testimony of Majinder and Harman who stated that all the accused had what Bryn brought and his companions to go away, otherwise they would finish all of them and when they returned Muzar accused fired the pistol at them and thus in view of the nature of the weapons with which they had gone to the disputed piece of land, they knew that murder was likely to be committed in prosecution of their object. Another finding given by the High Court was that the appellants went to forcibly dispossess the complainant and took that object in view they went to the disputed field to take forcible possession and that the complainant's party on coming to know of it went to the field and returned. Muzar fired the pistol and thus caused the death of Ramcharan. The High Court also held

We are also of the opinion, that the act of the accused was premeditated, and well-designed and that the accused considering the circumstances of the case and the weapons with which they were armed, knew that murder was likely to be committed in accomplishment of their common object.

For the appellants it was contended that the High Court was not justified in drawing the inference that other members of the party of the appellants had knowledge of the existence of the pistol. There is no doubt that as the evidence of the father, Tej Singh, must have known that the son, Muzar, had a pistol. And in the circumstances of this case the High Court cannot be said to have erroneously inferred as to the knowledge of the rest as to the possession of pistol by Muzar.

event for the use left under the second part of section 148, Indian Penal Code, in view of the weapons with which the members of the unlawful assembly were armed and their conduct which showed the extent to which they were prepared to go to accomplish their common object.

Counsel for the appellants relied on *Queen v. Abdul Ah (I)*, and argued that section 148 was inapplicable. There the learned Judges construing the Full Bench gave differing opinions as to the interpretation to be put on section 148 Indian Penal Code. That was a case where the members of an unlawful assembly were to take forcible possession of a piece of land. The view of the majority of the Judges was that finding unopposed opposition by one member of the party of the complainant and also finding that they were being overpowered by him, one of the members of the unlawful assembly, whose main aim of joining the unlawful assembly was not proved, fired a gun killing one of the occupants of the land who were raising forcible opposition. It was also held that the act had not been done with a view to accomplish the common object of driving the complainant out of the land, but it was in consequence of an unexpected counter attack. Aravam, J. was of the opinion that the common object of the assembly was not only to forcibly eject the complainant but to do so with show of force and that common object was compounded both of the use of the means and attainment of the end and that it amounted to the commission of murder. Pannik, J. said that the offence committed must be immediately connected with that common object by virtue of the nature of the object. The members of the unlawful assembly must be prepared and intend to accomplish the object at all cost. The use was, did they intend to attain the common object by means of murder, if necessary? If events were of sudden origin, as the majority of the learned Judges held them to be in that case, then the responsibility was entirely personal. In regard to the second part he was of the opinion that for its application it was necessary that members of the assembly

must have been aware that it was likely that one of the members of the assembly would do an act which was likely to cause death. Courts, Chief Justice, was of the opinion that firing was not in proper course of the common object of the assembly and that there was not much difference between the first and the second part of section 149. He said:

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At first there does not seem to be much difference between the two parts of the section and I think the cases which would be within the first, offences committed in prosecution of the common object, would be, generally, if not always within the second, namely, offences which the persons knew to be likely to be committed in the prosecution of the common object. But I think there may be cases which would come within the second part and not within the first.

JONES, J., held in the circumstances of that case that assembly did not intend to commit, nor knew it likely that murder would be committed. FORTES, J., interpreted the section to mean that the offence committed must directly flow from the common object or it must so probably flow from the prosecution of the common object that each member might antecedently expect it to happen. In the second part, Jones seems to know that some members of the assembly had previous knowledge that murder was likely to be committed.

This section has been the subject matter of interpretation in the various High Courts of India, but every case has to be decided on its own facts. The first part of the section means that the offence committed in prosecution of the common object must be one which is committed with a view to accomplish the common object. It is not necessary that there should be a preconcert in the sense of a meeting of the members of the unlawful assembly as to the common object, it is enough if it is adopted by all the members and is shared by all of them. In order that the case may fall under the first part, the offence committed must be committed antecedently with the common object of the unlawful assembly of which

the accused were members. Even if the offence committed is not in direct prosecution of the common object of the assembly, it may yet fall under section 149 if it can be held that the offence was such as the members knew was likely to be committed. The expression "know" does not mean a mere possibility, such as might or might not happen. For instance, it is a matter of common knowledge that when in a village a body of heavily armed men set out to take a woman by force, someone is likely to be killed and all the members of the unlawful assembly must be aware of that likelihood and would be guilty under the second part of section 149. Similarly if a body of persons go armed to take forcible possession of the land, it would be equally right to say that they have the knowledge that murder is likely to be committed if the circumstances, as to the weapons carried and other conduct of the members of the unlawful assembly clearly point to such knowledge on the part of them all. There is a great deal to be said for the opinion of GOUGH, CHIEF JUSTICE, in *Rabid Ali's case* (1) that where an offence is committed in prosecution of the common object, it would generally be an offence which the members of the unlawful assembly knew was likely to be committed in prosecution of the common object. That, however, does not make the common proposition true: there may be cases which would come within the second part, but not with in the first. The distinction between the two parts of section 149, Indian Penal Code, cannot be ignored or obliterated. In every case it would be an issue to be determined whether the offence committed falls with in the first part of section 149 as explained above or it was an offence such as the members of the assembly knew to be likely to be committed in prosecution of the common object and falls within the second part.

Counsel for the appellants also relied on *Chakrasingh Gowda v. State of Mysore* (2). In that case there were special circumstances which were sufficient to dispose of it. The charge was a composite one raising up common intention and common object under sections 149 (1) and (2) of the I.P.C.

(1) A.I.R. 1911 S.C. 70.

and 189 Indian Penal Code and this Court took the view that it really was one under section 149 Indian Penal Code. The charge did not specify that there, all the members had a separate common intention of killing the deceased, different from that of the other members of the unlawful assembly. The High Court held that the common object was merely to chastise the deceased and it did not hold that the members of the unlawful assembly knew that the deceased was likely to be killed in prosecution of that common object. The person who was alleged to have caused the fatal injury was acquitted. This Court held that on the findings of the High Court there was no liability under section 34 and further, the charge did not give proper notice, nor a reasonable opportunity to those accused to meet that charge. On these findings it was held that conviction under section 302 read with section 189, was not justified in law, nor a conviction under section 34.

It was next argued that the appellants went to take possession in the character of the complainants who were in possession and therefore the common object was not to take forcible possession but to quietly take possession of land which the appellants believed was theirs by right. In the first place there were proceedings in the Revenue Department going on about the land and the complainants were opposing the claim of the appellants and then when people go armed with lethal weapons to take possession of land which is in possession of others they must have the knowledge that there would be opposition and the extent to which they were prepared to go to accomplish their common object would depend on their conduct as a whole.

The finding of the High Court, as we have pointed out was that the appellants had gone with the common object of getting forcible possession of the land. They divided themselves into three parties, Maska appellant was in the field where paddy was sown and he was ploughing it. Micky Subedar and Michal were in the sugar field and cutting the crop. Tej Singh was keeping watch. When the party of the complainants on being

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It was then contended that Mung did not want to fix the parcel and was hesitating to do so till he was asked by his father to fix and, therefore, penalty of death should not have been imposed on him. Mung carried the parcel from his house and was a member of the party which wanted to take forcible possession of the land which was in possession of the other party and about which proceedings were going on before the Revenue Officer. He fully shared the common object of the unlawful assembly and must be taken to have carried the parcel in order to use it in the prosecution of the common object of the assembly and he did use it. Merely because a son took a parcel and caused the death of another at the instance of his father is no mitigating circumstance which the court would take into consideration.

In our opinion the courts below have rightly imposed the sentence of death on May. Other appellants being equally guilty under section 143, Indian Penal Code, have been suitably sentenced to imprisonment for life.

The specific trust therefore, be discussed

Figure 1. The effect of the concentration of the solution on the adsorption of the dye. The concentration of the solution was 0.01, 0.02, 0.03, 0.04, 0.05, 0.06, 0.07, 0.08, 0.09, 0.1, 0.2, 0.3, 0.4, 0.5, 0.6, 0.7, 0.8, 0.9, 1.0, 1.5, 2.0, 3.0, 4.0, 5.0, 6.0, 7.0, 8.0, 9.0, 10.0, 15.0, 20.0, 30.0, 40.0, 50.0, 60.0, 70.0, 80.0, 90.0, 100.0, 150.0, 200.0, 300.0, 400.0, 500.0, 600.0, 700.0, 800.0, 900.0, 1000.0, 1500.0, 2000.0, 3000.0, 4000.0, 5000.0, 6000.0, 7000.0, 8000.0, 9000.0, 10000.0, 15000.0, 20000.0, 30000.0, 40000.0, 50000.0, 60000.0, 70000.0, 80000.0, 90000.0, 100000.0, 150000.0, 200000.0, 300000.0, 400000.0, 500000.0, 600000.0, 700000.0, 800000.0, 900000.0, 1000000.0, 1500000.0, 2000000.0, 3000000.0, 4000000.0, 5000000.0, 6000000.0, 7000000.0, 8000000.0, 9000000.0, 10000000.0, 15000000.0, 20000000.0, 30000000.0, 40000000.0, 50000000.0, 60000000.0, 70000000.0, 80000000.0, 90000000.0, 100000000.0, 150000000.0, 200000000.0, 300000000.0, 400000000.0, 500000000.0, 600000000.0, 700000000.0, 800000000.0, 900000000.0, 1000000000.0, 1500000000.0, 2000000000.0, 3000000000.0, 4000000000.0, 5000000000.0, 6000000000.0, 7000000000.0, 8000000000.0, 9000000000.0, 10000000000.0, 15000000000.0, 20000000000.0, 30000000000.0, 40000000000.0, 50000000000.0, 60000000000.0, 70000000000.0, 80000000000.0, 90000000000.0, 100000000000.0, 150000000000.0, 200000000000.0, 300000000000.0, 400000000000.0, 500000000000.0, 600000000000.0, 700000000000.0, 800000000000.0, 900000000000.0, 1000000000000.0, 1500000000000.0, 2000000000000.0, 3000000000000.0, 4000000000000.0, 5000000000000.0, 6000000000000.0, 7000000000000.0, 8000000000000.0, 9000000000000.0, 10000000000000.0, 15000000000000.0, 20000000000000.0, 30000000000000.0, 40000000000000.0, 50000000000000.0, 60000000000000.0, 70000000000000.0, 80000000000000.0, 90000000000000.0, 100000000000000.0, 150000000000000.0, 200000000000000.0, 300000000000000.0, 400000000000000.0, 500000000000000.0, 600000000000000.0, 700000000000000.0, 800000000000000.0, 900000000000000.0, 1000000000000000.0, 1500000000000000.0, 2000000000000000.0, 3000000000000000.0, 4000000000000000.0, 5000000000000000.0, 6000000000000000.0, 7000000000000000.0, 8000000000000000.0, 9000000000000000.0, 10000000000000000.0, 15000000000000000.0, 20000000000000000.0, 30000000000000000.0, 40000000000000000.0, 50000000000000000.0, 60000000000000000.0, 70000000000000000.0, 80000000000000000.0, 90000000000000000.0, 100000000000000000.0, 150000000000000000.0, 200000000000000000.0, 300000000000000000.0, 400000000000000000.0, 500000000000000000.0, 600000000000000000.0, 700000000000000000.0, 800000000000000000.0, 900000000000000000.0, 1000000000000000000.0, 1500000000000000000.0, 2000000000000000000.0, 3000000000000000000.0, 4000000000000000000.0, 5000000000000000000.0, 6000000000000000000.0, 7000000000000000000.0, 8000000000000000000.0, 9000000000000000000.0, 10000000000000000000.0, 15000000000000000000.0, 20000000000000000000.0, 30000000000000000000.0, 40000000000000000000.0, 50000000000000000000.0, 60000000000000000000.0, 70000000000000000000.0, 80000000000000000000.0, 90000000000000000000.0, 100000000000000000000.0, 150000000000000000000.0, 200000000000000000000.0, 300000000000000000000.0, 400000000000000000000.0, 500000000000000000000.0, 600000000000000000000.0, 700000000000000000000.0, 800000000000000000000.0, 900000000000000000000.0, 1000000000000000000000.0, 1500000000000000000000.0, 2000000000000000000000.0, 3000000000000000000000.0, 4000000000000000000000.0, 5000000000000000000000.0, 6000000000000000000000.0, 7000000000000000000000.0, 8000000000000000000000.0, 9000000000000000000000.0, 10000000000000000000000.0, 15000000000000000000000.0, 20000000000000000000000.0, 30000000000000000000000.0, 40000000000000000000000.0, 50000000000000000000000.0, 60000000000000000000000.0, 70000000000000000000000.0, 80000000000000000000000.0, 90000000000000000000000.0, 100000000000000000000000.0, 150000000000000000000000.0, 200000000000000000000000.0, 300000000000000000000000.0, 400000000000000000000000.0, 500000000000000000000000.0, 600000000000000000000000.0, 700000000000000000000000.0, 800000000000000000000000.0, 900000000000000000000000.0, 10000000

CIVIL ENGINEERING

Authors: Jörn Petersen, Johannes Wimmer, and Jörn Petersen, Johannes Wimmer

SUBO KUMAR, DIRECTOR AND CHIEF ENGINEER

100

[illegible]

SRI THAKURJI MAHARAJ BHAIJMAN
(Prajapati)

Withdrawal of first-court granting permission that depends on an attorney's savings is a valid feature of public-
Cost Procedure Code (2001) 115, note 10.

The plaintiff filed a suit for declaration of title to some property and the outcome of the suit depended upon the proof of a will but one of the attending witnesses to the will was now dead by the defendant.

Abstract

199

Prin-
cipal
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—
App.
Tribunal
Muzaffar
Karnal

The plaintiff believed that he was served upon the wrong so he began and continued and then later on he was caused to prove the will by the proceedings of the wrong. The plaintiff therefore applied for the withdrawal of the case with liberty to bring a fresh suit on the same cause of action and the court granted the said withdrawal of the case. A revision was filed against the above order.

Held, (i) that the plaintiff was faced with an emergency of protecting such evidence as the law required under the custody provisions of s. 10 of the Indian Evidence Act and the order was in the nature of a formal defect.

(ii) That the powers of the High Court in revision are not available for correction of errors of law, mistakes from these errors may be and whenever may be the result of those errors on the terms of the case.

Varney Joseph v. Shalimar Chakla (1)

Krishna Chandra v. Bala Nayan (2)

*K. J. Pandeyan, Arjunan v. Ramlal, Religious Endow-
ment Board, Madurai* (3) noted on.

And further that the exercise of revisional powers by the Court are discretionary and the High Court can refuse to grant any that discretion unless there was likely to be some substantial failure of justice and in this case of course he said that unless the order of the court below is set aside there was any failure of justice which was a substantial failure element and unless the plaintiff is given permission to withdraw his suit with liberty to bring a fresh suit later on, it was he that was likely to suffer injustice and not the defendants.

Civil Revision No. 137 of 1952 against the order passed by Q. U. Subba; *Munaf Sheikh, Lucknow* dated the 24th May, 1952.

The facts appear in the judgment.

N. Bhatia for applicants.

Baba Lal Srivastava for the opposite party.

The judgment of the Court was delivered by—

MURRAY, J.—This is an application in revision by the defendants against the order of a *Munaf* of Lucknow granting permission to the plaintiff to withdraw his suit and further to file a fresh suit on the same cause of action.

1 A. I.R. 264 (2).

2 A.I.R. 1952 3 C. 20.

3 *Prakash L.R.* 74 L.R. 42.

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Mr. Bawer, in the main, relied on the decision of the Bombay High Court in *Tamachand Depuchand v. Gadgil & Ahmed Bhagwan* (1) where a learned Single Judge of that Court held that under circumstances in which that learned Judge referred to in his decision, the order which the court below in that case made permitting the withdrawal of the suit, was an justified since the learned Judge felt that the view of the court below that there was a formal defect was an erroneous view. It is true proposition that each case is authority for itself and no more, unless a case lays down a broad proposition of law, it cannot have even a perfunctory value. *Tamachand Depuchand v. Gadgil* (1) was decided on its own facts and it is pertinent to notice that even while allowing the application in revision, the learned Judge left it open to the plaintiff to have the defect, which apparently was the learned Judge found there was in the suit, corrected by a proper application. Whether under the circumstances of that case the error was one of form or not need not be considered by us at all, for in the case before us the circumstances with which we are concerned is order to determine whether

or not the defect which faced the plaintiff assumed, in what rule 1 of Order XXIII of the Code of Civil Procedure calls formal defect, are different. Therefore, in our view the Benchay decision could lead him way part, if any, to that conclusion of Mr. Banerji on which he could succeed.

The relevant portion of Order XXIII, rule 1 of the Code of Civil Procedure is in these words:

(1) At any time after the institution of a suit the plaintiff may, as against all or any of the defendants, withdraw his suit or abandon part of his claim.

(2) Where the court is satisfied—

(a) that a suit must fail by reason of some formal defect, or

(b) that there are other sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim, it may

It has been held, and it may be taken now as the proper rule of law, that what are other sufficient grounds in rule 1 (2) (b) has to be equated generally of what is provided in (2) (a). The learned Judge who made the reference in this case was not shown the Full Bench decision of this Court reported in *Abdul Ghaffar v. Abdul Rahman* (1), where it was held that the words other sufficient grounds in rule 1 (2) (b) of Order XXIII of the Code cover grounds analogous to those mentioned in rule 1 (2) (a).

The question that we have to determine, therefore, is first, whether there was a defect of the nature contemplated by Order XXIII, rule 1 of the Code of Civil Procedure or not. The court below thought that there was, and on an examination of the circumstances to which we have already referred in the earlier portion of this judgment of ours, we cannot say that the court below was wrong. The plaintiff could succeed only if he could furnish proof of the will in his favour. The proof of the will not only depended upon the proof of the fact

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that a certain individual had executed the will and that he had the power and capacity to execute that will, but further that under the last proof of the will had to be an accordance with the provisions of section 63 of the Indian Evidence Act. Section 63 required that if a document had by virtue of some legal provision, to be admitted, then it could not be used as evidence unless one surviving witness at least had been called for the purpose of proving its execution, if there was an attending witness alive and subject to the process of the court and capable of giving evidence. In this particular case there was no dispute that the attending witness was alive and capable of giving evidence and subject to the process of the court and, therefore, any failure of such a witness from the witness box meant the failure of the plaintiff to prove the will. The plaintiff usually placed before the court a will defective and the deficiency was not of his own creation. If at all, the deficiency which the plaintiff found had to come possibly, in the mathematics of the other side. The plaintiff was not in this case faced with incapacity to adduce sufficient evidence to prove a fact, but he was faced with an incapacity of producing such evidence as the law required under the statutory provisions. The defect which, therefore, was likely to arise in the way of the plaintiff succeeding was in our opinion in the nature of a formal defect for, as we have said, there was a law which had to be adhered to in the manner of giving evidence in regard to the proof of the will.

The other material question which was canvassed at great length, namely, whether we could as the circumstancers of this case exercise our revisional jurisdiction to correct any error that a court may have committed while permitting or refusing to permit the withdrawal of a test with permission to file a fresh one on the same case of issue. The revisional jurisdiction of this Court is confined to the four corners of the powers given in section 115 of the Code. It is well established that every error of law, or every error of procedure, or every error of fact could not be revised by the High Court under its power under section 115. It was pointed out by Bose,

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J., in his order of reference in *Maryam Begum v. The State of Bihar* (1) and that statement of the law by Bose, J., was approved by their Lordships of the Supreme Court in *Kishorlal Chaurasia v. Nand Lal Kishor* (2) at page 28, that the words 'legally or material irregularity' do not cover other errors of fact or law. They do not refer to the decision arrived at but to the manner in which it is reached. The errors contemplated relate to material defects of procedure and not to errors of either law or fact after the formalities which the law prescribes have been complied with. The scope of section 115 of the Code of Civil Procedure came up for consideration before their Lordships of the Privy Council in a number of decisions and their Lordships in those cases point out that there was no justification for the view that section 115 (c) of the Code of Civil Procedure was intended to authorize the High Courts to interfere and correct gross and palpable errors of subordinate courts so as to prevent gross injustice in non-appealable cases. It is, therefore, clear that the powers of the High Court in revision are not available for correction of errors of law, however gross those errors may be, and whatever may be the result of those errors as the merits of the case. This power of the High Court is only available where the High Court could legitimately hold that the court below had erred in its jurisdiction or had refrained from exercising a jurisdiction vested in it or it acted illegally or with material irregularity in the exercise of that jurisdiction, namely, committed such an error of procedure, a null, void procedure, and the error had resulted in failure of justice or some such thing. Their Lordships of the Supreme Court in Chaurasia's case quoted with approval a passage from the decision of the Privy Council in *N. S. Prasad v. State of Bihar* (3) which passage is in these words: "and lay down the scope of section 115 of the Code of Civil Procedure clearly:

Section 115 applies only to cases in which an appeal lies, and, where the Legislature had provided

(1) AIR 1948 Nag 208.

(2) AIR 1950 SC 21.

(3) 1948-49 L.R. 12, 13, 14.

THE
HUMAN
LAW
COURTS
IN
THE
TENTH
CENTURY
BY
HAROLD
J. L. HARRIS, J.

no right of appeal, the number of matters in which the order of the trial court, right or wrong, shall be final. The statute empowers the High Court to satisfy itself on three matters: (a) that the order of the subordinate court is within its jurisdiction; (b) that the case is one in which the court ought to exercise jurisdiction; and (c) that in exercising jurisdiction the court has not acted illegally, that is, in breach of some provision of law, or with material irregularity, that is by committing some error of procedure in the course of the trial, which is material in that it may have affected the ultimate decision. If the High Court is satisfied on these three matters, it has no power or authority, because it differs, however probably, from the conclusions of the subordinate court in questions of fact or law.

Applying the above-quoted principle to the case in hand, all that could be said was that possibly the court below committed an error in regard to 'its view of what was a formal defect' within the meaning of rule 1 of Order XXIII, or that the court below committed an error in regard to what could be deemed 'sufficient grounds' within the meaning of rule 1 (2) (b) of Order XXIII of the Code of Civil Procedure. The error, therefore, which the court below may have committed, was in our opinion, at best, an error of law and not an error that in any manner affected the jurisdiction of that court to make or refuse to make an order which that court could make under the provisions of Order XXIII.

In the end we wish to add that since the exercise of the reserved power by the Court are discretionary, the Court can refuse to exercise that discretion unless there was likely to be some substantial failure of justice. In this case we are unable to say that, unless the order of the court below was set aside, there was any failure of justice, much less a substantial failure thereof. The court below has found, and so have we, that unless the plaintiff was permitted to withdraw the suit at this stage with the right to bring a fresh suit later, it was he that was likely to suffer injustice and not the other side.

In this view of the matter also we are of the opinion that we should not interfere, even if we had the power, our powers in revision and interfere with the order of the court below.

In the result we dismiss the application in revision with costs.

Application dismissed.

CIVIL MISCELLANEOUS

Before Mr. Justice Dhillon

MOHNUDDIN AND OTHERS (Applicants)

v.

STATE OF UTTAR PRADESH (Respondent Party)

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Co-operative Societies in Uttar Pradesh—Part of Auditors'—Higher scale of pay sanctioned for—Division of Auditors into two sections—Division in the Auditors gives the higher scale as a matter of course while those in the other subject to a qualifying test—Validity of—Constitution of India, 1950 Arts 19, 18, 226, 227, 231.

On the recommendation of the Pay Commission, the Govt. of Uttar Pradesh sanctioned a higher scale of pay for the Auditors in the Co-operative Department. The department was thereafter split up into two sections—the Govt. Co-operative Societies Auditing Section and the Co-operative Societies Auditing Section. (Generally—and, whilst those in the former were given the higher scale as a matter of course, those in the latter were to secure it subject to a qualifying test prescribed by the department.

On a petition under Art. 226 of the Constitution praying for an order directing the Govt. of Uttar Pradesh to give the persons in the latter section the higher scale of pay without, usually.

Held overruling the preliminary objection that there is an bar to the constitutional guarantee under Art. 14 and the power conferred by Art. 226, no necessity of the kind was imposed by the manner—petitioners' constitutional claim dropped. The exercise of all the powers—legislative—exercise of judicial—derived from the Commission and a further that under Art. 226 are subject to and must be exercised by the provisions of Part III of the Constitution. The provision of Art. 18 is,

number are Auditors in the Co-operative Department of the State of Uttar Pradesh. They have varying lengths of service to their credit, the number of years for each being specified in paragraph 1 of the affidavit. They have been engaged in what the petitioners describe as the highly qualified work of auditing. At the time of the appointment of the petitioners the maximum educational qualification was the passing of the Intermediate Examination or any equivalent thereof. Previously the entire Auditing Department consisted of a single section in which every Auditor enjoyed the same status and rate of pay. But with the growth of Co-operative Societies in Uttar Pradesh the department was split up in two sections the Co-operative Societies Auditing Section and Co-operative Societies Auditing Section (General) to be called hereinafter as the Co-operative and General Auditors respectively. Since the splitting up of the department the petitioners have been placed in the General Section.

In the year 1948 a committee was appointed by the State of Uttar Pradesh to consider and suggest revision of pay of the State employees in different departments. It is generally known as the U. P. Pay Committee. It made certain recommendations for raising the scales of pay for the Auditors of the Co-operative Department. These were partially accepted by the Government. The petitioners contend that the Auditors in the Co-operative Department, who at one time formed part of the Auditors of the Co-operative Department, were mentioned a revised scale of pay in the grade of Rs 120-4-280—E B—15-234. No qualifying test was prescribed in their case to enable them to enjoy the revised scale of pay. The same grade of pay was announced for the General Auditors including the petitioners. But in their case a qualifying test was prescribed by the Government.

The petitioners grievance is that the imposition of the test on the auditors in the Co-operative Department, (General), is arbitrary and unjust, and amounts to illegal discrimination between the General Auditors and

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the Case Auditors. They allege that there is no difference in the work and qualifications of Auditors employed in the two branches of the Co-operative Audit Department. The requirements of the employees in the two departments is not distinguishable. There is no reasonable basis for distinguishing between the employees of the two departments for the purpose of refusing them scales of pay. The petitioners further contend that there is no difference in the nature of the work, to be done by the Auditors of the two sections of the department engaged on each of them. The petitioners further contend that the decrease in wages the scale of pay was based on the consideration that charged economic conditions required higher scale of pay. It was not due to a decision to reject better or superior qualifications. Therefore the requirement of a qualification was from the General Auditors, while extending the Case Auditors amounts to an arbitrary discrimination against the former class of Auditors to which the petitioners have come to this Court under Article 226 of the Constitution and pray for the reliefs mentioned above.

The petition is opposed by the State of Uttar Pradesh and a counter affidavit has been filed on its behalf. A preliminary objection has been taken that a joint writ petition containing a prayer for mandamus cannot be filed on behalf of 25 petitioners. The counter affidavit states the circumstances in which the impugned decision was made. It is stated that prior to 1955, the Auditors of the Co-operative Department, rendered the accounts of all Co-operative Societies. After 1955, the Auditors in the Subordinate Co-operative Service rendered the accounts of the Case Co-operative Societies. This system continued till 1959. In that year, a number of Case Auditors were recruited by the Registrar Co-operative Societies, U. P. in consonance with the Case Development Scheme. They were placed under the control of the Case Commissioner. In 1965, the Auditors serving in the Case Development Scheme were transferred to the control of the Registrar Co-operative Societies, U. P., and were amalgamated with

the Auditors of the Co-operative Department. But in 1947, the control of the Auditors serving in the Cane Development Scheme was again transferred to the Cane Commissioner U. P. Prior to 1947 Auditors for the Cane Department were recruited by the Public Service Commission on three different occasions—in 1939, 1945 and 1948.

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On 1st April 1952, the pay scale of the Auditors in the Cane Department was revised from Rs. 75-120 to Rs. 120-255. Simultaneously with the revision of scales of pay, the minimum educational qualifications for Cane Auditors was raised to a Bachelor's Degree in Arts, Commerce or Science. The notification by which this change was made is dated 9th September 1952 and filed as Annexure I of the court-affidavit. The pay scale of the Co-operative Auditors in the General Section was also raised to Rs. 120-250. In their case too there was a simultaneous decision to raise the minimum educational qualifications for future recruits to a Bachelor's Degree in Arts, Commerce or Science. It is denied by the State that the reason for the raising of the scale of pay was to enable the employees to meet the increased cost of living. They state that the scales of pay were revised to attract persons of better qualifications. It is pointed out that the qualifications for future recruits to the service were raised simultaneously with the raising of the scales of pay.

The existing Auditors in the General Section, many of whom were recruited a long time ago and did not possess a Bachelor's Degree, were also granted the higher scale of pay on the date of notification; they were enjoying a scale of pay of Rs. 75-8-120. But this privilege was made subject to the condition that every existing Auditor must pass a qualifying test to be held by the Public Service Commission before he could be selected for the higher scale of pay. No test was prescribed for the Cane Auditors who were also given the benefit of the new scales of pay.

It is denied by the State that exemption of the Cane Auditors from the test amounts to discrimination against

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the General Auditors. It is noted that the General Auditors are required to audit the accounts of bigger Co-operative institutions, such as the U. P. Co-operative Bank, District Co-operative Federations, Co-operative Unions and Societies of special types. According to the State, the auditing of institutions like these requires much greater knowledge and skill in auditing than in the case of Case Unions. It was, therefore, thought that the skill and capability of the existing Auditors in the General Section should be tested by means of a special test. It is further alleged by the State that the conditions of service and responsibility in the Case Section are different from those in the General Section. The Case Section contains 80 Auditors and the General Section 127. With the creation of a separate Co-operative Audit Organisation the scope for promotion for the General Auditors has considerably increased. There are five posts of Senior Auditors carrying scale of Rs 200-300 and 11 more such posts are to be created shortly. In addition, there are five posts of Regional Audit Officers in the scale of Rs 250-350. There is also a post of Deputy Chief Auditor and one Chief Audit Officer. Thus it is pointed out that the auditors of the General Section have ample scope of promotion in their own Section. They are also eligible for promotions as Inspectors in the Co-operative Department. But the Case Auditors have hardly any scope for promotion in their Section. Thus according to the State, not only the standard of skill and responsibility required in the two sections are different, but the conditions of service and prospects of rise in the General Section are also better. The State therefore contended that the promotion of a test on the existing Auditors in the General Section is not an act of discrimination.

Before considering the legal points raised by the petitioners it is necessary to clarify the position as regards facts. It appears that the State decided to raise the minimum educational qualification for Auditors to be recruited in the future. Simultaneously the scales of pay were made more attractive. The Auditors already

in service, however, presented a problem. They had been appointed at a time when the minimum qualification was lower than the proposed new qualification. Their scales of pay were also lower. The Government had two alternatives before them. They could have left the existing Auditors untouched. The result would have been that these old Auditors would not have been entitled to the new scales of pay. It was conceded by learned counsel for the petitioners that the existing Auditors, whether in the Case or the General Section, had no legal right to demand that the existing scales of pay should be given to them. But the Government, for reasons of policy, decided to extend the benefit of the higher scales of pay to the existing Auditors. In the case of Case Auditors, the privilege was extended without the imposition of any condition. But the Auditors in the General Section were required to pass a qualifying test before they could be given the benefit of the new scales of pay. It is necessary to state this background for a proper understanding of the nature of the grievance of the present petitioners. Learned counsel for the petitioners admitted that he would have no case if the Government had decided to leave all the existing Auditors in their old scales of pay. He also conceded that the petitioners could have no objection to the imposition of a test as such. If Government had imposed a test on all Auditors, the petitioners could not have complained of any discrimination. Learned counsel for the petitioners also conceded that no existing right or privilege of the petitioners had been infringed. On the contrary, he even conceded that the Government have conferred a favour on all the existing Auditors by deciding to extend the revised scale of pay to them. His grievance is that this favour has been discriminated in a manner which is discriminatory. In conferring this favour, Government have placed the General Auditors under a disadvantage. It has imposed on them a test without passing which they could not avail of it, whereas the Case Auditors get it without a test. That, he submits amounts to discrimination which is forbidden by Article 33 of the Constitution.

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Learned counsel for the petitioners, *July 5, 1932* Dunham, who argued the case with ability, advanced the following argument against the validity of the decision to impose a qualifying test on the petitioners. He contended that the State had a large area of executive discretion in its dealings with and control over its civil servants and that the courts will not ordinarily interfere with this discretion. But he contended that if it is an invasion of a civil servant's Government violates the principles laid down in Articles 16 and 14 of the Constitution in decision will be unconstitutional. He further contended that the process of choice in Articles is not limited to the stage of initial appointment but extends to subsequent promotion, the increase or reduction of salaries, selection for posts and termination of service. In other words he contended that the principle of equal opportunity laid down by the Constitution protects the Government servant throughout his service. If Government violates the principles laid down in Articles 16 and 14 either in making the initial appointment or subsequently in making promotions, raising or reducing salaries, selecting officers for special or prize posts or in the matter of termination of appointment such action will be hit by either or both of these Articles.

The present case raises two questions. (1) whether the action of the State Government in imposing a qualifying exam test on the Andons in the General Section without prescribing a similar test for the Cane Andons amounts to all the circumstances of the case to discriminate and (2) if it does, whether such discrimination is hit by Articles 16 and 14 of the Constitution.

A preliminary objection was taken by learned counsel for the State that the petition is misconceived. It was contended that Articles 14 and 16 do not apply to the petitioners' case at all, as the powers of the State in regard to the tenure of office of its employees are conferred by Article 510 of the Constitution and that these powers are not controlled by Articles 14 and 16. I shall deal with this objection first.

the general provision finds place. Then again Article 14 speaks of law and laws. Article 310 is a constitutional provision and is not included in the term law or laws as mentioned in Article 14. The entire constitution must be read as one whole and every part of it must be given full effect. If Article 310 were to be limited or controlled by Article 14, it can hardly be said that the Government may use temporary services of its officers at pleasure. In my opinion, Rule 445 is not rendered void by reason of Article 14.

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The narrow generalis specialis non derogat will apply only when a prior enactment to harmonise two conflicting provisions of the same statute has been made and failed. With respect, no such attempt appears to have been made in *Raj Mohan's* case (1) in accordance with the rule of harmonious construction. As was observed by the Supreme Court in *Ford Motor Co. v. State of India* (2), the rule of construction is well settled that where there are in an enactment two provisions which cannot be reconciled with each other, they should be so interpreted that if possible effect should be given to both. The question whether Article 14 controls the dealings of the State with its employees requires a careful adjustment of the respective spheres of Articles 14 and 310. According to my view, I merely observed that Article 14 does not control Article 310 because Article 14 is a general provision relating to all kinds of laws and all kinds of persons while Article 310 deals with a special or particular matter, namely Government servants and circumstances of their services, with respect to the matter is not so simply disposed of.

Generalis specialis non derogat was explained by Lord Sargison, C. in *Sheriff v. The Fara Cruz* (3), in these words: "whether general words in a law are capable of reasonable and sensible application with out extending them to subject specially dealt with by earlier legislation." That earlier and special legislation

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is not to be held indirectly repealed, altered or derogated from merely by force of such general words without any indication of a particular intention to do so. This applies in the case of two Statutes, one of them being enacted later. In *Marshall's Interpretation of Statutes*, 9th Edition, the rule has been thus described:

It is but a particular application of the general presumption against an intention to alter the law beyond the immediate scope of the statute. (sup. p. 152) to say that a general Act is to be constructed as not repealing a particular one, that is, one directed towards a special object or a special class of objects. A general later law does not abrogate an earlier special one by mere implication. Generally speaking one derogates. But *Marshall* made it clear that for this rule to apply the Act must cover the same territory. (p. 158)

When two parts of the same statute, and that statute a constitution, are being interpreted, the lawmakers as the drafter must not be lost sight of. On the one hand, it is true that if a general provision is expressed in one part of the Constitution and a particular exception in another part which is incompatible with the general one, the particular exception is treated as an exception to the general one. (*Marshall* p. 174.) On the other hand the following principles must be applied and exhausted before the rule is applied. First, the two provisions must cover the same area before one can be treated as an exception to the other. But it cannot be said that Article 318 and Part III cover the same area. The one deals with the extent of office of State servants and the other with fundamental rights of citizens. It may be true that Article 318 and 317 deal with a particular matter but that matter is not a special area within the territory of Part III. It deals with the powers of the State as regards its servants. But there are other provisions conferring other powers on other authorities in particular matters. If each of these provisions is accorded the status of a special provision, the general provision relating to fundamental rights and

therefore an exception to it, fundamental rights may be so taken away by exceptions as to be rendered illusory. Secondly, the two provisions must be so woven parallel with each other that they cannot be reconciled and the special provision must be treated, taken in its own sense, as an exception to the general provision.

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In this case even assuming that Article 304 is a special provision vis-à-vis Part III, a proposition with which I do not agree it is possible to reconcile the two. With respect to this aspect appears to have been made in *Ray Kishore's* case (1). Article 14 does not in the least disempower or disempower from the power of the State to terminate the services of any servant at its pleasure. It merely requires that this power should not be used in a discriminatory manner. But the content of the power vis-à-vis any particular employee is not diminished by Article 14. Thirdly, the entire Constitution must be read as a whole, and each part must be given the same priority without giving undue weight to any particular part. This applies with particular force to the Constitution of India which is very detailed and elaborate. The edifice of our Constitution contains many mansions, no part of which can claim a greater sanctity than others except to the extent clearly specified, expressly or by clear implication, in the Constitution itself. Fourthly, each and every part of the Constitution must be so interpreted as to preserve the spirit of a Constitution, which is a fundamentally different document from other statutes. As was observed by Hogg, J. in *Attorney General v. Brewery Employees Union* (2).

Although we are to interpret the words of the Constitution on the same principles of interpretation as we apply to any ordinary law, these very principles of interpretation compel us to take into account the nature and scope of the Act that we are interpreting so to remember that it is a Constitution, a mechanism under which laws are to be made, and not a mere Act which declares what the law is to be.

(1) A. I. R. 1954 AIR 240.

(2) 1958 F.C.R. 400.

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The spirit of our Constitution is contained in the Preamble. The principles expressed in the Preamble must permeate every part of the Constitution without any exception. One of these is to ensure to all its citizens equality of status and of opportunity. I must not be understood to mean where the language of the statute explains the words must be construed to bear the language to accord with the spirit of the Preamble. But in considering the scheme of the Constitution as a whole and the respective spheres of different parts, the Preamble can be treated as a key to open the minds of the Act.

The real question is whether the powers of the Government under Article 318 are exempt from the restrictions contained in Articles 13 and 14. The scheme of the Constitution does not favour any exemptions except those specified in the Constitution itself. Article 13 says that all laws in force, in so far as they are inconsistent with the provisions of Part III, shall to the extent of such inconsistency be void. It further requires that the State shall not make any law which takes away or abridges the fundamental rights conferred by Part III and that any law made in contravention of this requirement shall, to the extent of the contravention, be void. The phrase all laws and any laws have been made subject to no exception with the result that any law, by whomsoever made or passed, shall be void if it contravenes the provisions of any Article relating to fundamental rights.

ASHMEETA, J., argued that Article 318 being a special provision dealing with a special or particular matter (Government servants and terms of their services) cannot be controlled by Article 14 which is a general provision. With respect there are several answers to this argument. First, Article 318 is not a special provision within the area of Part III. By way of contrast Article 342 read with 334 is an illustration of a special provision. For it preserves the rights and privileges of former Rulers of Indian States and empowers in effect that Parliament shall not make laws taking away those rights. Thus, being a special provision,

may be treated as an exception to Article 14 which enjoin that all persons shall enjoy equality before the law and the equal protection of the laws. But Article 310 is neither a special provision nor an exception *vis-à-vis* Part III. It says, Any person holds office during the pleasure of Government. This Article deals with the power of the State in its relation with every servant individually. It invests the State with the power to terminate in its pleasure the service of any particular employee. That power has no limitation *vis-à-vis* that employee, (except of course the safeguard in Article 311). But to terminate the service of any particular employee is one thing; to use that power as a cloak for discrimination against or in favour of a whole class community, race or religion is quite another thing. The first is within the power under Article 310, the second is not. If the State says to an employee, You are retired under rule 489 of the Civil Service Regulations, the action is protected by Article 310 and the State is not called upon to explain why it selected X and not Y for compulsory retirement. But if the State says to X, You are retired because you belong to this particular community, or if X, Y, Z and others prove that they have been retired because they belong to a particular community, the State has used Article 310 not merely to retire an individual but to discriminate against a whole class. Whether one views an action as an abuse of the power under Article 310 or regarding that power, the result is the same: one must hold that the State has travelled beyond the orbit of Article 310 and wandered into the orbit of another Article 14. As it has left the protective sphere of Article 310 its action will be stricken and dragged down by the constitutional pull or weight of the particular Article into whose orbit it has strayed. The orbits of Parts III and XIV are different though they revolve round the same Constitution.

With profound respect, therefore, the entire argument of *ANANDAWA J*'s judgment treating Articles 14 and 310 as a special and general provision respectively is based on a premise which does not exist. Secondly,

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rights conferred by Part III in their application to the members of the armed Force or the Force charged with the maintenance of the public order. It has been given the power to restrict or abrogate these rights so as to ensure the proper discharge of their duties and the maintenance of discipline among them. Article 355 provides for the suspension of the provisions of Article 19 during emergencies. Article 359 provides for the suspension of the enforcement of fundamental rights during emergencies. Subject to these and any other express exceptions in the Constitution, the provisions relating to fundamental rights in Part III admit of no other exceptions. Secondly, ANANDWALA, J.'s decision will place the Governor and his powers under Article 310 on a pedestal which even Parliament and its laws do not enjoy. If any law passed by Parliament can be struck down on the ground that it violates any provision of Part III, there is no reason why any rule or regulation or order of the Governor under Article 310 should not be subject to a similar control.

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ANANDWALA, J., observed: If Article 310 were to be limited or controlled by Article 14, it can hardly be said that the Government can terminate the services of its servants at pleasure. Thus, he apprehended that any control of Article 310 by Article 14 may render the powers under the former Article illusory. With respect there is no ground for any such apprehension which is based on a misapprehension of the nature and purpose of the content of Article 14 over Article 310. Part III does not derogate in the least from the powers of Government to terminate the services of any employee at pleasure. It simply ensures that this vast power shall not be used in a discriminatory manner and that the State employees shall not be made the victims of bigotry, racialism, casteism or provincialism—ends expressly banned by Article 15. But within the constitutional limits imposed by Part III, full effect must be given to the power under Article 310. No employee has any remedy against any action of the State. However arbitrary it may be.

But arbitrary is not the same thing as discriminatory. If Government acts on power under Article 300 as a discriminatory measure, its action will be hit by Article 34. Several illustrations can be given. If the U. P. Government were to issue a notification exempt such railway every South Indian employee who has completed 25 years of service on the alleged ground that South Indians cannot adjust themselves to the local conditions in Uttar Pradesh, this would be an arbitrary national exercise of its absolute power under rule 46B. Again if the Central Government reverses the theory of marital and non-marital races and issues a notification terminating the services of every person belonging to specified non-marital races in the defense services, (to which the provisions of Article 311 does not extend), the notification even if issued in the honest belief as the truth of this doctrine, will be hit both by Articles 14 and 32—by the first, because it is generally discriminatory and by the second because of discrimination between citizens employed in the Armed Forces on the ground of race. But if ANANDALAKSHI's interpretation is accepted, these notifications will be inoffensive, as they were issued under a special provision of the Constitution.

The practical adjustment of the absolute power under Article 310 and the fundamental rights under Part III will depend upon, the facts of each case. Any action which is patently discriminatory will be struck down. For example to take the very rule which was considered by ANANDALAKSHI, if any systematic attempt to apply rule 46B of the Civil Service Regulations to officials belonging to a particular race, religion or caste and to weed them out in the calumnious exercise of the absolute power under rule 46B will be hit both by Article 14 and Article 15. The action of the State, on proper proof, will be declared unconstitutional on the ground that it is part of a policy of purposeful discrimination, to quote the words of the U. S. Supreme Court in *Paton v. State of Mississippi* [1]. On the other hand if certain employees are completely removed in the bona fide exercise of the

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Is not a single case did the Court reject the submission based on Article 14 on the ground that the powers of the State under Article 310 were not controlled by Article 14. In *Satish Chandra Sen v. Union of India* (1), a civil servant who had been engaged on a temporary basis of a contract was discharged from service after expiry. He filed a petition before the Supreme Court under Article 32 of the Constitution and argued that his rights under Articles 14 and 16 (1) had been infringed. The Supreme Court rejected this contention on merits and held that, in fact, there had been no discrimination against him. They also held that Article 16(1) was equally inapplicable as the whole matter rested on contract. In the *State of Madhya Pradesh v. G. C. Mandwar* (2) a Government employee filed a petition under Article 32 on the ground that a resolution of the Government of Central Provinces and Berar (now Madhya Pradesh), fixing a scale of dearness allowance for its servants discriminated against him in violation of Article 14 of the Constitution. It was contended on his behalf that the resolution of fixing a scale of dearness allowance under rule 64 of the Fundamental Rules was law as defined in Article 15 (2) (a) of the Constitution, and if that law infringed Article 14, it could be declared void. In considering this argument the Court observed, "This is a contention which is clearly open to him and the question, therefore, has to be decided as whether the resolution dated 25th September 1948, is bad as infringing Article 14. The argument was examined on merits and rejected."

It appears, therefore, that the view expressed by *AGRAWALA, J.* in *Ray Kishorey case* (3) cannot be reconciled with the view expressed by the Supreme Court in the *State of Madhya Pradesh v. G. C. Mandwar* (2) which is a later case, (*AGRAWALA and SENNA, JJ.*), delivered their judgment on 8th November 1953, and the Supreme Court case was decided on 15th May, 1954. Following the example of *MOORHAM, J.* in *Shankar Prasad v. Registrar, Allahabad University* (4), when he agreed a

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Full Bench decision of this Court in favour of principles subsequently laid down by the Supreme Court, I prefer to follow and apply what I believe to be the view of the Supreme Court. I therefore, hold that the arguments based on Articles 14 and 15 is open to the petitioners and overrule the preliminary objection. I shall now proceed to examine both contentions on merits.

Mr. Dwivedi pointed out that Article 16(1) does not refer to employment but matters relating to employment. According to him, the addition of the words matters relating to before the word employment makes a significant difference in the scope of the clause. If it had said, 'there shall be equality of opportunity of all citizens in employment', it might have been possible to argue that the guarantee of equality is confined only to the stage of seeking employment. But the clause goes further and extends the guarantee to all matters relating to employment. What are these matters relating to employment?

Mr. Dwivedi contended that they include such matters as promotional selection for posts, posts, termination of service and so on. There are, according to him, matters relating to employment and as the clause guarantees equality of opportunity for all citizens in such matters, it means that it is intended to protect the citizen even after he has entered the service of the State. It is a safeguard against discrimination throughout his career as a servant.

I think that the addition of the words 'matters relating to' is not of much of much significance. It is noteworthy that these words govern not only employment but also the following words, 'appointment to any office under the State'. The clause can really be split in two in the following manner:

There shall be equality of opportunity for all citizens in matters relating to employment and there shall be equality of opportunity for all citizens in matters relating to appointment to any office under the State.

It is obvious that 'appointment to any office under the State' means the act of making appointment to a

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the particular office. The word is not 'appointments' but 'appointments to any office'. A man may hold an appointment for any length of time but his appointment to any office takes place only once as the result of an act of appointment. Therefore, the words 'appointments to any office' refer to the initial act of appointment to any office and not to subsequent matters like increase in pay, promotion or termination of service. Indeed it would be absurd to suggest that the termination of a person's service is a matter relating to his 'appointment to any office'. Thus the addition of the words 'matters relating to' does not of itself have the effect of extending the guarantee of equality beyond the stage of initial appointment.

In my view the word 'matters' includes such things as issuing applications for an appointment, advertising a particular post, prescribing qualifications for any office, facilities for interview, and so on. All these things are 'matters relating to appointments to any office' under the State and there must be equality of opportunity in respect of them. For example, if an all India post is advertised only in an obscure provincial paper published in a regional language, the result would be a denial of opportunity to all qualified candidates who live in regions where the paper does not circulate or who do not know that particular regional language. Or again, if the place of interview is deliberately fixed in a place which is inaccessible to an overwhelming majority of the qualified candidates and is selected with the sinister purpose of favouring a favoured class of candidates resident in that place, there will be a denial of equality of opportunity in the matter of interviews, a 'matter' relating to appointment to that office.

Thus the words 'matters relating to' do not have the effect of extending the scope of the word 'employment'.

In *Sethusunderam Thevar v. State of Bihar*, (1) AIR 1954, 1, relying upon what he considered the dictionary meaning of the word 'employment', held that it

refer to a condition in which a man is kept occupied in executing any work, and that it means not only an appointment to any office for the first time but also the continuance of that appointment. According to him, the implied under meaning finds support from two things:

(1) the dictionary meaning of the word 'employment'; and (2) the expression 'employment or appointment'. With the former aspect, the dictionary meaning of the word 'employment' does not always mean a condition in which a man is kept occupied in executing any work. My copy of Webster's Collegiate Dictionary contains the following meaning of the word 'employment': 'act of employing, or state of being employed, as in such sentences'. The Great Oxford Dictionary gives the following three meanings of the word 'employment':

1. The act of employing. 2. The state of being employed. 3. Service. Thus according to the dictionary the 'employment' may refer either to the actual act of employing a person or to his condition of being employed. Two alternative meanings of the word are possible and to determine its meaning in that case one has to look to the context in which the word is employed.

The choice between two alternative constructions should be made in accordance with well recognized canons of interpretation. I may summarize some of them very briefly. First if two constructions are possible the court must, as mandated by the Supreme Court in *The State of Punjab v. Ajash Singh* (1) adopt the one which will create smooth and harmonious working of the Constitution and where the other which will lead to absurdity or give rise to practical inconvenience or make well established provisions of existing law nugatory. Secondly as was observed by P. B. Mukherji, J., in *Ram Hari v. Nilwan Das* (2) constitutional provisions are not to be interpreted and applied by narrow technicalities but as embodying the working principles for practical government. Thirdly, as laid down by the U. S. Supreme Court in *Gonzalez v. United States* (3)

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 74 S.Ct. 1254
 24 L.Ed. 2d 159

(1) AIR 1955 S.C. 20. (2) AIR 1951 Cal 188.
 (3) 338 U.S. 125, 70 S.Ct. 1114, 34 L.Ed. 1055.

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the provisions of a Constitution are not to be regarded as mathematical formulae and that their significance is not formal but vital. I take this observation to mean that practical considerations rather than formal logic must govern the interpretation of those parts of a Constitution which are obscure or capable of two alternative meanings. Fourthly as was observed by the Madras High Court in *Dorairaja v State of Madras* (1) is a choice of two alternative constructions, the one which avoids a result unjust or injurious to the nation should be preferred. Fifthly, before making its choice between two alternative meanings, the court must read the Constitution as a whole, take into consideration its different parts and try to harmonise them. Lastly, and above all, as was observed by the Supreme Court in *Gopalan v State of Madras* (2), the court should proceed on the presumption that no conflict or repugnancy (between the different parts) was intended by the framers of the Constitution. The last principle was laid down in slightly different language by the Privy Council in *Jones v Commonwealth of Australia* (3), in which Lord Willes observed as follows:

The question then is that of construction and in the ultimate result must be determined upon the actual words used, read not in vacuo but as occurring in a single complex instrument in which one part may throw light on another.

These principles of construction are well known, though it is not always easy to apply them to a particular case. I find however, evidence to consider the meaning of the phrases 'matters relating to employment and appointment to any office under the State' in the light of these principles.

The question is whether the guarantee of equal opportunity under Article 16 is confined to the stage of initial employment or appointment or extends even beyond it. This question involves an interpretation

(1) 8 I.R. 199 (Mad. 1958).
 (2) 35 S.R. 199 (S.C. 1958).
 (3) 1908 I.C. 27 (H.L.).

199 2 is wider than clause 1. It is negative in character and
 200 prohibits discrimination between citizens on the
 201 ground of religion, race, caste, sex, descent, place of
 202 birth, residence or any of them. The purpose of this
 203 clause like that of Articles 13 and 14, is to ban from
 204 Indian life the conception of a master race or 'harmas'
 205 volk. It forbids the relegation of any citizen to an
 inferior status, like the Jews in Nazi Germany or the
 206 Asiatics and Africans in South Africa, because of his
 religion or race or caste or sex or descent or place of birth
 or residence. It holds out a promise to all citizens that
 207 wherever and whenever a group of citizens compete for
 employment or office under the State no particular
 208 religion or race or caste shall be considered either a
 disqualification or an extra qualification. It enforces
 that religion, race and the other attributes specified in
 this clause will be treated as irrelevant by the State when
 considering the qualifications of citizens competing for
 any employment or office under the State.

Clause 1 provides a guarantee of equality of a positive nature. It enforces that all citizens must have equality of opportunity in matters relating to employment or appointments to any office under the State. The scope of this clause is wider than that of clause 2. Within this clause, it would not be possible for the State, while fully observing the injunction against discrimination on the ground of religion, race, caste, or sex, to confer their recruitment to State services on a favoured line. For example, not so very long ago, recruitment to the Foreign and Diplomatic service in Great Britain was so arranged that only the sons of the wealthiest class could enter it. There was no discrimination on the ground of religion or race, but a poor man had practically no chance of entering the British diplomatic service. One of the qualifications, so far as I recollect, was the possession of a private income of £200 a year. This sort of discrimination is banned by clause 1. All citizens, rich or poor must be given an equal opportunity when competing for the leaves and roles of State jobs. It commands that the State must

give equal opportunity to all citizens in matters relating to employment or appointment to any office under the State. The two phrases requiring interpretation are equality of opportunity and matters relating to employment in office.

The words equality of opportunity do not present any difficulty in interpretation. They contain a guarantee that no person hindering to employment under the State shall be closed to any citizen of India provided he has the necessary qualification. A necessary corollary of this guarantee may be that the State shall not impose qualifications which are deliberately designed to keep out any particular class, community, or section of citizens. Furthermore, the guarantee is not limited to services of paid jobs, it also extends to any office under the State, honorary or otherwise. It holds out to the people a solemn assurance that no office, honorary, high, shall be legally beyond the reach of any citizen, however humble. The principle of social equality underlying this clause is a complete negation of the philosophy of caste of our old *Shastras* which require that *Shudras* must confine themselves to the service of the higher castes. We know how under Ramanappa, Shambhoo the *Shudra* was belittled for the offence of procuring *manuscripts* and (presumably) reading the *Vedas*. Today he would be qualified to be appointed a Professor of *Vedic Studies* in a State University. This clause reflects the general purpose and policy of the Constitution to prevent the division of the nation into superior and inferior groups like the Aryans and Jews in North Germany and whites and blacks in South Africa and to achieve this purpose, it specifies certain things which the State is expressly prohibited from doing when considering the qualifications of any citizen for any job or office. These are his or her religion, race, caste, sex descent, place of birth and residence. The phrase equality of opportunity extends the concept of social democracy to the sector of State services and public offices.

The phrase in matters relating to employment presents the real controversy. It follows the words

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'equality of opportunity. The two phrases read together guarantee to every citizen equality of opportunity in matter relating to employment or appointment to any office under the State. How far does this guarantee extend? The answer depends upon the meaning of the words in matters relating to employment. According to Mr. Darnall, the guarantee of equal opportunity is not limited to the stage of initial appointment, but also extends to subsequent promotion, salary, and in reduction of salary or termination of service. If the State, in dealing with these matters, discriminates between citizens, no decision will be hit by Article 16. If I may put the matter in my own words Mr. Darnall would like the guarantee of equality of opportunity to protect the citizen not only when he is looking for State employment but also to throw its protective mantle over him throughout his career of service under the State. If at any stage the State discriminates against him in the matter of promotion or selection for promotion, re-employment, termination of service and other kindred matters, the long arm of Article 16 should reach forth and crush the discrimination.

The words employment and appointments in office occur several times in Article 16 in its different clauses. Clause 1 says that no citizen shall be ineligible for or discriminated against in respect of any employ ment or office under the State. Now, a person is considered ineligible or eligible for employment only at the time of initial appointment. No question of his eligibility can arise after he has been selected for the job or post. The word employment in this clause refers to the stage of selection or appointment.

Clause 2 is in the nature of a proviso to Article 16. It runs as follows:

Nothing in this Article shall prevent Parliament from making any law prescribing in regard to a class or classes of employment or appointments to an office under any State specified in the First Schedule or any local or other authority within its territory any requirements as to residence within that State prior to such employment or appointment."

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relating to employment or appointment to any office, had in mind only the initial stage of appointment. They guaranteed equality of opportunity and fair conditions at the stage of seeking State employment but reserved certain powers for the State relating to this stage. Had they intended to extend the right under Article 16(1) even beyond the initial stage of employment, the phrase would have referred to the State some other powers in such vital matters as promotions, selections for higher posts, termination of service and particularly, retirement. But the phrase completely ignores every stage after the initial act of employment or appointment. The inference must be that the stage after the initial appointment stage was not in the mind of the makers of the Constitution at all when they used the phrase in matters relating to employment or appointment to any office. They only reserved powers in regard to the initial stage of appointment because the scope of equality under clause 1 is confined to this stage.

Article 16 applies to citizens and the guarantee of equality of opportunity in matters relating to employments and appointments to office is meant for citizens only. On the other hand, under our Constitution, non-citizens are eligible for public services and posts under the Union and the States. This is made clear in Part XIV of the Constitution, which relates to services under the Union and the States. Article 165 empowers the appropriate Legislature to regulate, subject to the provisions of the Constitution, the recruitment and conditions of service of persons appointed to public services and posts in connection with affairs of the Union or of any State. The use of the word 'persons' is significant. It is not there by accident or mistake for whenever the Fathers of the Constitution wanted a particular post to be reserved for citizens they did so by using the word 'citizens'. In the Article dealing with that post. Seven posts, specified in the Constitution, have been expressly reserved for citizens. These are: the office of President [Article 54(1) (a)], Vice-President [Article 54(1) (a)(i)], Governor of State [Article 107], Judge of the Supreme

Court [Article 124(1)] or of a High Court [Article 217 (2)] Attorney General of India [Article 76 (1)] and Advocate General of State (Article 168). Apart from these posts, a non-citizen can hold any post or office under the Republic or join any service under the Crown or the State. Even the Auditor General and Comptroller General of India and the Chairman of the Union or State Public Service Commission need not be citizens. Article 334 of the Constitution expressly provides that every person who was appointed by the British Crown in India and should elect to continue, after the Constitution, to serve the State, shall be entitled to receive the same conditions of service and the same rights to which he was entitled before the commencement of the Constitution. This Article was inserted as an encouragement to non-citizens willing to continue in service.

1951
 Amendment
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 Part of
 Union
 President
 Section 1

These are not empty provisions, for hundreds of citizens are serving in various capacities under the Union and the States and some of them are holding important posts. The fathers of the Constitution, for reasons of national policy, made non-citizens eligible for various posts in public services and posts. Our Constitution was not framed by persons sitting in an ivory tower or by professors that up in a class room. It was drafted and finalised, after prolonged discussion and debate, by persons with considerable administrative experience and genuine knowledge of the people and its needs. The Framing Fathers were conscious that India in 1950 was—(it still remains to be)—very backward as compared with the more advanced countries of the West in science, industry, agriculture, medicine and many other matters. They realised that the country would need the service and assistance of foreign workers and experts for a long time. For this reason, they made non-citizens eligible for service under the Republic. Under Article 334, they gave the State power to recruit non-citizens to its services, at its discretion. To day, if the Union Government decides in the national interests, to create an Indian Service of Scientists composed of citizens and non-citizens, it has the power to do so under the Constitution.

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Employment of foreign labour, skilled and unskilled, on a large scale is frequently made by Sovereign States in their own interests. The British Government due to shortage of man-power in England has encouraged the employment of foreign workers. During the First Year Plan of the U. S. S. R., the Soviet Government recruited a large number of foreign skilled workers whose number ran into lakhs. The makers of our Constitution were mindful of these considerations when they made non-citizens eligible for employment in public services and posts.

The meaning of the words "employment and appointment" may be examined against this background. The guarantee of equality of opportunity in matters relating to appointments is meant for citizens only, where as all the services and posts under the Republic, (barring a few specified posts) are open to non-citizens. Therefore, in interpreting Article 16 (1) care must be taken to avoid any interpretation which shall, in the name of equality, create inequality between the different classes of those services. If the meaning of employment is restricted to the stage where citizens are competing for or seeking employment there is no inequality. There can be no legitimate grievance of India like any other national sovereign State, confers a fundamental right on its own citizens. But if the meaning of "employment and appointment" is stretched to include all the posts beyond the usual employment, the content of guarantee under Article 16(1) changes. It is converted from an equal right of citizens into an unequal right of employees who are citizens to the exclusion of employees who are not. The result may be inequality between citizens employees and non-citizen employees, for it will give to the former a right which is denied to the latter. By way of illustration, both in the Patna and Benares cases a non-citizen employee of the State would not have been enabled to impugn the validity of the impugned decision under Article 16(1). In the present case before me, assuming that the impugned act imposed on the post holders a bar by Article 16 (1), a non-citizen auditor, just of European descent, would not be able to avail of the

provisions of that Article. He would have no interest in it, but not the petitioners.

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Provision
Section A

This would not be in accord with the policy underlying the provisions making non-citizens eligible for public services and posts. The Commission must be read as a whole and care must be taken to avoid giving a meaning to one part which will be inconsistent with the policy underlying another part. An intention to discriminate between citizen employees and non-citizen employees would be inconsistent with a policy to make non-citizens eligible for every service and post, (barring a few) under the Constitution. This inconsistency is revealed if the meaning of the words 'matters relating to employment and appointment to office' is confined to the wage when citizens are seeking employment.

I shall now consider respectfully the authorities cited by learned counsel for the petitioners. Mr. Durrani relied on two cases in support of his contention that Article 16(1) is not limited to the wage of casual employment. The first is a judgment of a Division Bench of Bombay High Court (*Talabchand and Dattal. JJ.*) in *Pandurang Kishanbhai More v. Union of India* (1). The second is a decision of a Division Bench of Patna High Court (*Sukhramdas Thakur v. State of Bihar*) (2). In the first case, it was held that the opportunity of equality in matters of employment ensures for the benefit of the citizen not merely in case of his casual engagement, but also in case of matters relating to the continuance of that engagement. The facts of that case were these. The plaintiff Pandurang Kishanbhai More was engaged in 1944, as a mistry in the Bombay Telephone Workshop. He was involved in a strike and was arrested in 1949 and detained under the Bombay Public Security Measures Act. On 2nd July 1949, he was suspended from duty with effect from the date of his arrest and detention. Thereafter on 29th March, 1954 he was served with an order terminating his services with effect from the date of his arrest. On

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With Order 1954 he was released from detention and applied to the Manager of the Workshop for re-employment, which was refused. He brought a suit in which he pleaded, *inter alia*, that the order of removal was in violation of Articles 14 and 15 of the Constitution inasmuch as the plaintiff was arbitrarily picked up and asked

The Bombay High Court held that the words 'matters relating to employment' mean that the purpose of Article 15 was to ensure equality and equitable treatment in matters relating to initial engagement during continuance of that engagement and at the terminal end of that engagement. To quote once again from the judgment of Desai, J.: The guarantee of equality embraces all matters of employment: the Article in terms clear and simple speaks of all matters relating to employment; and it is impossible to concede the suggestion that what is contemplated by Article 15 is only the initial stage when the citizen is employed to serve the State. Nothing so unfair and startling could have been the contemplation of the framers of the Constitution. The guarantee, in our judgment, was intended to endure and not to be illusory. For these reasons the learned Judge held that considerations of equality apply not merely at the initial stage, that is, where one citizen is engaged in service or appointed to any office by the State. All along during the continuance of the engagement or while the citizen is availed of that equality of opportunity. Here also there can be no discrimination between one employee and another on any ground of prejudice or bias or on which is irrelevant.

On the particular facts of the case, their Lordships held that the order terminating the services of the plaintiff was discriminatory and hit by Article 15 of the Constitution. It set aside the decree of the lower court dismissing the employee's suit and granting him a declaration that the order of termination was void and illegal.

In the *Panna* case there was a difference of opinion between the two learned Judges, who heard the case and,

on the usual reference to a third Judge, RAMSAY, J., held, (agreeing with ARBUTHNOT, J.), that the guarantee under Article 18 applies both to the case of appointment and termination of appointment. He took the view that unless the words of Article 18 were given a wider meaning, the guarantee of equality of opportunity in matters of employment would be nullified. The facts of that case were these. The petitioner Subramanian Thakur was appointed as a Market Inspector in the Supply and Marketing Department on 7th August, 1946. On 6th December, 1947 his services were dispensed with as a measure of retrenchment. He was re-appointed as a Supply Inspector on 15th October 1948. He was holding this post on 27th February 1954 when he received an order from the District Magistrate of Madras terminating his services with effect from the next date, 28th February 1954. It was admitted by the State that the order terminating his services was made in pursuance of and in accordance with the policy of the Government laid down in a circular issued on 25th February, 1954. This circular contained elaborate provisions for carrying into effect the policy of retrenchment for reasons of economy. It stated *inter alia*, that the staff should be retained in order of seniority on the basis of their service records. But this principle was waived in favour of three classes of cases:

- (1) members of scheduled tribes and scheduled castes;
- (2) displaced persons; and
- (3) political refugees.

The employees belonging to these three classes were to be retained on grounds of policy even if they were found to be junior in service. The petitioner took no objection to the exception in favour of the scheduled tribes and scheduled castes but he attacked the favour shown to political refugees and displaced persons. He contended that as a result of this favourable consideration of these two classes of employees the petitioner, though fully qualified, competent and senior to many, had been

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Memorandum
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State of
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Section 2

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sorrounded while employees present to him had been notified for no better reason than that they were either displaced persons or political refugees. But for this discrimination he would not have lost this job. He, therefore, impugned the constitutionality of the Government circular which contained the exception in favour of displaced persons and political refugees. The postmaster relied upon Article 18(1) for his attack on the above-cited circular. He contended that the guarantee of equality of opportunity in this clause prohibited discrimination even at the stage of termination of service. It was argued that the expression "employment" in any office under the State includes in it the notion of continuity in employment and that, therefore, the rule of equality of opportunity is equally applicable to matters relating to termination of employment as well and that any distinction in the matter relating to an employment, unless the State was having a rational relation to the other workers in discrimination and, therefore, offends against the rule of equality of opportunity.

In considering this argument, *Aswan, J.*, examined the meaning of the word "employment" in Webster's Dictionary—[occupation, business, that which engages the head or hands in agricultural employment or mechanical employment.] The learned Judge thought that this meaning clearly suggested that the word "employment" referred to a condition in which a man is kept occupied in executing any work. In other words,

it means not an appointment in any office for the first time but also the continuity of that appointment. On the facts of the case, *Aswan, J.*, held that the exception to the rule of equality in favour of displaced persons and political refugees was on the basis of a transient condition of employment contained in Article 18(1) and (2). He was in favour of holding that the Government circular was valid and that the petitioners were to be deemed to have continued in service.

Das, C. J. disagreed. But he raised none of any discussion of the question whether the expression "employment" in clause 1 of Article 18 does or does not

man constantly at employment because he considered such discussion unnecessary. He took the view that the services of all the informants were terminated and fresh appointments were made. Therefore, all the appointments were new. He further held that in making the new appointments, certain selective principles were followed which were neither arbitrary nor unreasonable and were not in violation of Article 14(1). He held that the aforesaid exception in favour of displaced persons and political sufferers did not violate the general principle of equality before the law guaranteed by Article 14 of the Constitution. But he did observe that had he held the view that the classification of displaced persons and political sufferers was arbitrary and unreasonable then it would have been his duty to issue an appropriate writ in favour of the petitioner. It is not clear whether he had in mind Articles 14(1) or 14 when he made that observation.

On a reference to the third Judge REYNOLDS, J., field agreeing with ARMSTRONG, J. that the pleasure test imposed by Government was neither rational nor reasonable in so far as it showed a preference to displaced persons and political affiliates. He did not accept the view of ARMSTRONG, J. that the word "employment" as used in Article 18 (1) included contractancy in employment but he held that the word "appointment" did. To quote his exact words, with great respect I do not agree with the interpretation placed by ARMSTRONG, J. on the word "employment" in Article 18 though I agree for reasons which I shall presently state that the guarantee under Article 18 applies both to the case of appointment and continuation of appointment. In other words, then he concurred with ARMSTRONG, J. that the protection of Article 18 continued even after the stage of seeking employment though he gave his own reasons for reaching that conclusion. His reasons are best stated in his own words.

My view is that the noted appointment in Article 16 refers as a matter of necessary implication also to the termination of appointments.

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 Statement

 Given in
 Court

 Annex 1

whereas the object of the guarantee given under Article 16 would be nullified. For instance it would be open to the administrative authorities to make appointments to particular posts in conformity with the provision of Article 16 but on the very next day they may terminate the appointments of the candidates by applying the discriminatory rule prohibited by Article 16(2).

Such a system would be working and unfair and could not have been intended by the Constitution makers. I am of the view that the guarantee of equal opportunity under Article 16(1) applies not only to appointment, but also to termination of appointment. Any other interpretation would render the protection given under Article 16 illusory.

Thus whereas Anwar, J., based his argument on the word 'employment', Romesh Chandra, J., relied on the word 'appointment'. But they reached the same conclusion that the guarantee of equality under Article 16(1) continues even beyond the initial stage of competition for employment and is not restricted to the initial act of employment by the State.

In *Forbes v. Ashworth Mers v. Union of India* (1) the Bombay High Court, (TAMBORANE and DRAKE, JJ.) took the view that the equality in matters of employment extends for the benefit of the citizen not merely in case of his initial engagement, but also in case of matters relating to the termination of that engagement. Much of their argument is concerned with the question whether the special provisions of Article 330 relating to the services under the State displace the general provisions in Articles 14 and 16 relating to equality of opportunity. But the interpretation of the language of Article 16 is very brief, the entire discussion being contained in the paragraph quoted by me in an earlier part of this judgment.

Thus, the learned Judge appears to have adopted the reasoning of the Patna High Court in *Sabharwal v. State*(1) that, unless the word 'employment' is made to include all the stages after the initial act of employment, the guarantee of equality of opportunity will be rendered illusory. I shall therefore consider with respect the judgments in the Patna case.

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JUDGE OF
HIGH COURT
PATNA

In the Patna case *Ansari, J.*, attached, decisive significance to the fact that the word 'employment' is juxtaposed to the word 'appointment' in Article 16(1). To quote his exact words: 'This implication of wider meaning of the word 'employment' finds support from the workings of Article 16(1) itself. Therein the expression used is 'employment or appointment'. It implies that the word 'employment' means something different to what is meant by the word 'appointment'. I therefore, think, that Mr. Anas Ali Shah, (counsel for the petitioner in this case), is right in contending that the word 'employment' has in it an element of continuity of engagement which one enters upon when appointed to the office.' With respect, the expression used in Article 16(1) is not 'employment or appointment', but 'employment or appointment to any office'. Therefore the word 'employment' was being used to mean something different from 'appointment to any office'.

It is well recognized that 'employment' does not ordinarily include offices which are honorary or do not carry any salary. Conversely, there can be employment which does not relate to any office. For example, casual labourers working on the Bhakra Nangal project are employed by the State but do not hold any 'office'.

By including both 'employment and appointment to any office' the Constitution has ensured that the obnoxious doctrine of a master race which defiles the Constitutions of every country, shall find no place in India. All citizens shall have an equal opportunity of serving the Republic either as paid employees or in other positions of responsibility, paid or unpaid. To

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give no distinction. the office of President cannot be included in the phrase "employment under the State" but the makers of the Constitution wanted to insure that every citizen of the Republic, whenever he has been elected or nominated, shall be entitled, equally with others, to cherish the hope that he may one day be elected President. The position under our Constitution contrasts with that under the (now defunct) Constitution of Mexico which reserved the office of the President for Mexicans. The guarantee of equality has been made all embracing by including within its scope both "employment" and "appointment to any office under the State."

The learned Judges in the *Peters* case attached considerable importance to the word "appointment." With respect, the emphasis is not so much on the word "appointment" but on "office." In some cases, appointment can be included in "employment" but appointment to certain offices, (particularly those which are honorary or elective), would not be. For example, it may be said that A. B. was appointed a judge of the High Court on a certain date and that he has been employed as a judge since that day. But it can not be said of a person who is elected President of a Municipal Board that he is "employed" as a President. (He may be a lawyer or a doctor by profession.) The guarantee of equality has been given a fuller content by the use of both the words "employment" and "office." This appears to be the true significance of the juxtaposition of the words "employment" and "appointment to any office" in this clause.

In the same case *Hamannan, J.*, by reason of his own agreed with *Archer, J.* that the guarantee under Article 16 applies both to the case of appointment and termination of appointment. He pointed out that Article 16 makes a distinction between "appointment" and "employment." He felt that the words "employment" and "appointment" connote two different conceptions. To quote his own words, appointment obviously refers to appointment to an office. The term "appointment" therefore implies the conception of

secure, duration, emolument and duties and obligations fixed by law or by some rule having the force of law. It is obvious that these elements are absent in the case of public employment which is a contract for temporary purpose. For example, laborers or experts engaged by Government for special professional tasks under definite contracts would belong to the category of persons in public employment. On the contrary, persons appointed to any Government post or service are not usually employed under bilateral contracts—they simply work under conditions standardized by laws and regulations.

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With deep respect, I am unable to agree that the word *appointments* normally implies the conception of tenure, duration, emolument, etc. I have already pointed out that the words *appointments* to any office are meant to include certain offices which would not ordinarily be covered by the word *employment*. I have pointed out that various offices though honorary or unpaid may be highly coveted by every citizen. The office of Chairman of a Municipal Corporation or Honorary Surgeon to the President or Peer Laureate (if ever it is created) may or may not carry any salary or emolument but they are offices of great and dignity. The term *appointments* when applied to the office of a Chairman of a Municipal Corporation cannot possibly imply the conception of *employment* which is one of the conceptions mentioned by the learned Judge. I can only repeat my respectful suggestion that the purpose of adding the words *appointments* to any office is to ensure that every citizen shall have an equal opportunity not only when he seeks a State job for his livelihood but also when he aspires for any office of position or honour or dignity under the State. The concept of the freedom or equality conferred by Article 16 is indeed by Part III itself a partly economic, partly social and partly spiritual. A few observations on the matter of fundamental rights guaranteed by the Constitution will not be out of place.

Chapter III relating to fundamental rights ensure that not merely economic rights, but various other kinds

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of rights which were considered necessary by the framers of the Constitution. (If I may borrow an observation of Mr Justice BARKER in an Allahabad case), to give a full and concrete content to the freedom of human personality in all its aspects. The freedom of speech and expression, the freedom of conscience and the freedom to profess practice and propagate religion have no concrete content whatsoever, but they were considered necessary for the blossoming of individual personality. The content of Chapter III is partly economic partly political and partly spiritual. Article 16 too has a content which is partly economic and partly social and spiritual. It guarantees that every citizen shall have an equal opportunity to seek employment under the State. To this extent its content is economic. It also guarantees that no citizen, however humble his status and whatever his religion, race, caste, sex or place of birth shall be ineligible for any office (including the highest) under the Republic. It reproduces the doctrine of a master race and bans the classification of citizens into a superior class which can be entrusted with positions of responsibility and an inferior class which must remain content with a position similar to that of Jews in Hitlerite Germany or Bantu-dominated South Africa. In a word it states that no citizen shall be branded with the stamp of inferiority or marginality, but that every citizen shall hold his head high and walk the soil of his country with dignity. To this extent Article 16 has a social and spiritual content. This appears to me to be the true significance of entrusting both employment and appointment to any office, in this Article.

It must not however be understood to mean that the phrase 'appointment to any office under the State' relates only to honorary or unpaid offices and completely excludes every office carrying a salary or emolument. As an illustration the leader of a political party commanding a majority in the Parliament and aspiring to be elected by the President as Prime Minister can hardly be considered seeking employment. If he is selected as Prime Minister, he will be deemed to be appointed to

an office under the State, though his post carries with it a salary. But the guarantee of equality contained in the phrase "appointment to any office under the State" extends to the office and requires that every citizen shall be eligible for the post of House Member regardless of his race, creed, or color, if he is the leader of a party or group commanding a majority in the Legislature.

Rainwater, J., advanced no additional reason for the argument that the word "appointment" in Article 18 refers to a matter of necessary implication also to the termination of appointment. If it did not, he argued, the object of the guarantee given under Article 18 would be nullified. The learned Judge gave an illustration to back this argument. For instance, he observed, it would be open to the administrative authorities to make appointments to particular posts in conformity with the provision of Article 18, but on the very next day they may terminate the appointments of the candidates by applying the discriminatory test prohibited by Article 18(2). In other words, the learned Judge feared that unless the guarantee of equality continues to protect a citizen even after he has become a State employee, the State may defer this guarantee by giving a job with one hand and taking it away with the other. With respect, there are two answers to this argument which was also raised in a more masterly form by Mr. Dwyer:

First, it is not quite correct that the object of the guarantee under Article 18 would be nullified if the words "employment and appointment to office" are restricted to the initial stage of making the appointment. Article 18, when applied to the hypothetical case where Government makes the appointment to day and terminates it tomorrow on grounds prohibited by Article 18(2). With great respect, I suggest that the employee would not be without remedy. If his appointment is terminated on account of religious bigotry, racial prejudice, custom or provincialism or sex, it would be hit by Article 18(1). Moreover, the power under Article 511 must be construed *bona fide*. A mala fide exercise or patent abuse of the power of removal would be illegal.

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The removal, for improper reasons, of an employee who was appointed only provisionally would obviously be a mala fide exercise of the power under Article 310 but even by Article 32(3). The aggrieved employee could mean that an action on the ground that his appointment and removal were a quibbling act and that, in fact, he had been deprived of the guarantee of equality of opportunity for employment, in what was given with one hand was simultaneously taken away with the other. On proper proof of fact, the court would hold that the authority never had any intention of giving him an equal opportunity under Article 32(3) from the very beginning and he got none. It is not quite correct, therefore, that the guarantee of equality of opportunity under Article 32(3) would be nullified or rendered illusory if the words employment and appointment to any office are restricted to the initial stage of employment. Mr. Datta's argument goes a little deeper. He contended that unless the words employment and appointment include the stage beyond the initial appointment and unless the employee is shielded against discrimination in such matters as promotion and termination of service, the guarantee of equality of opportunity will be rendered futile against a Government which is determined to discriminate against or victimise a certain class. Mr. Datta took Mr. Aruman, J., and a hypothetical illustration. Suppose, he said, ten years from now a party J comes to power on a programme and policy directed against a particular class M and a J Minister directs all the services to be purged of all Ms or that no M shall be promoted to key posts. In that situation unless words on matters relating to employment include the stage beyond the initial appointment, such a Government will succeed in violating the guarantee of equality in Article 32(3) etc. etc. I have quoted learned counsel almost word for word. Mr. Datta's illustration is of a state sinister import and sinister action taken.

The ultimate strength of a Constitution lies not so much in the excellence or perfection of the language of

the constitutional document, lies in the willingness of the people to accept and promote the principles underlying it. The foundation of every Constitution is its political, social and spiritual philosophy on which is based the entire edifice of the Constitution. This philosophy dominates every part of the Constitution. The social, political and spiritual foundations of the Indian Constitution are laid in its Preamble and partly also in the Directive Principles of State Policy which have been declared by Article 37 to be fundamental in the governance of the country. The significance has been explained in many judgments of the Supreme Court and of other High Courts and it is hardly necessary for me to add anything to them. But it is beyond dispute that the principles of secular political and social democracy and of liberty, equality and fraternity on which our Constitution is founded are the complete negation of the hypothetical programme of the hypothetical party J in Mr. Durrani's illustration.

Mr. Durrani asks me to visualize the situation after such a party with such a programme is elected and assumed power. I have no doubt in mind what the situation will be. A constitution derives its strength and reinforcement from the loyalty and support of the people. If at any time it loses this support it shall decay and wither, however excellent may be its draft. It was said of the Weimar Constitution of Germany that it contained the most perfect and the most elaborate safeguard for the freedom of the individual ever devised by the genius of jurists. But when the German people voted Hitler into power in an election it discovered by its verdict, the foundations of the Weimar Constitution as favour of Nazism. So if the party mentioned by Mr. Durrani, with a programme outlined by him is voted into power in India in a general election, it must be assumed that the people of India have withdrawn its support and loyalty from the Constitution. A constitutional breach of the allegiance of the people is like a body after the vital spark of life has left it. Even a living organism it becomes a corpse though all its parts are intact. If

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Can ever happen to our Constitution, no subordinate to Article 19 or any other provision can prevent Mr. Damodra's hypothetical party from carrying out its programme, any more than a foreign army can be prevented from invading India by the Municipal bye-laws of Amritsar.

Secondly, the appointment of a person to a post and his subsequent removal are two different categories of State acts, and each has been made subject of different conditions under the Constitution. A casual working employment under the State and a career in the employ of the State are in different positions. As the State employment creates contacts with each other under a guarantee of equality of opportunities. But when appointment meets the successful career joins the ranks of Government servants under the control and discipline of the State. He even surrenders some of his fundamental rights. He is no longer entitled to freedom of expression, nor can he purchase or sell property exceeding a specified value without the permission of the State. He accepts service on the understanding that his tenure of office is at the pleasure of the State. Article 310 invests the State with absolute control over the tenure of every State servant (subject to the safeguards contained in Article 311). This wide power was conferred on the State by the founders of the Constitution in their wisdom and for reasons of sound public policy. They adopted the Bernatz principle (subject to the safeguard of Article 311), under which the Crown can remove any servant at pleasure. This was no idle provision, invested in a high-sounding manner in persons who did not merit its emphasis. The Fathers of the Constitution devoted a special chapter to the services under the Crown and the State. Article 310 was woven into the fabric of the Constitution. They could have followed other schemes, some under which the State servants have been granted rights against the State. But, with their eyes open, they adopted the manner wherein have placed, (with subsequent under which the Crown can remove any servant at pleasure. They made it the most important pillar of

Chapter XIV, the pillar on which rests the State's control and power of discipline over its servants. Why? Presumably because they realised that in the position conditions of India, the interests of discipline and efficiency required that every State servant must have his place when he is talking to the State, so to speak. They wanted every State employee to realise that the State is the master who holds the whip in hand and that though the whip would be seldom used and on the contrary the State in India would treat its servants generously as in bounteous liberality, the whip hand must always be there. This appears to be the purpose for which Article 310 invested the State with arbitrary powers over its employees.

Of course, they provided constitutional safeguards against any unconstitutional abuse of the power under Article 310. Articles 14 and 15(1) ensure that the power under Article 310 will not be used in a discriminatory manner or to undermine the social democratic foundation of the State, or to introduce casteism, provincialism or casteism or bigotry in recruitment to State services or to weed out a whole class of community from State service. But within the limits of these effective safeguards, they intended the power under Article 310 to be really effective in the day-to-day administration of the State in matters relating to promotion, selection for higher posts and termination of service. The employees were deprived by the Constitution of any legal remedy for these grievances.

These considerations must be borne in mind in determining the scope and area of the word 'employment' in Article 16(1). Was it intended to place the employee under federal control in matters which concern the day-to-day administration? Was Article 16 intended to compel the State, in spite of Article 310, to render an explanation each time when an individual employee claims that 'he should have been promoted instead of the other fellow'? My answer would be no.

In determining the meaning of the words 'matters relating to employment' in Article 16(1), care must be

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when not in issue, the delicate balance between the powers under Part III and the wide powers of the State under Article 348. *Asanwadi v. J* took the extreme view that Article 348 was not subject to any control of Article 14. With respect, he did not consider that Articles 14 and 15 are safeguards against such abuses as racialist provocations, crimes or religious bigotry in the matter of remuneration of service. On the other hand, the learned Judge of the Bombay and Patna High Courts took the other extreme view. That equality of opportunity may mean access even beyond the stage of initial appointment to such matters as promotion, selection for higher posts, retrenchment, continuation of service and so on. With respect, such a wide interpretation of the words "matters relating to employment" will throw the door wide open to interference with the executive in the day-to-day administration of the State. As was observed by Lord Broom in *R. Foshate (Rae v. Secretary of State)*,⁽¹⁾ control by the Courts over Government in the most detailed work of managing services would cause not merely inconvenience but confusion. This criticism was quoted with approval by *Lalita, J.* in *Punjab State v. Bhagat Singh*,⁽²⁾ in which the learned Judge dismissed the suit of a police officer for a declaration that his dismissal was illegal and void.

In practice, the problem of adjusting the respective spheres of Articles 345 and 34 will require much common sense and practical wisdom. A power which is absolute in its own sphere has to be reconciled with an imperative which is transcendent. Abstract logic may demand that the two powers be in conflict and cannot be reconciled and that either one must absolutely control the other or the other made absolutely independent of the first. But constitutional problems are not solved like mathematical equations, for they are part of the problems of mortal life which do not conform to any mathematical formulae or rigid logic. The interpretation of the constitutional law of a people living under an old and complex civilization like ours demands, when solving

problems like the present, compromises, skilful adjustments which may not be strictly logical but which will make the Commission workable. Social life, which creates problems of constitutional law, is infinitely richer and more complex than abstract and empty logic. A page of history is worth a volume of logic, said Mr Justice Thomas Watson Holmes in *New York Trust Co v Egan* (1). He observed on another occasion, the life of the law has not been logic: it has been experience.

In the light of the principles of compensation discussed above and taking into consideration the language of Article 14, read together with the other provisions of the Constitution I hold, respectfully dissenting with the two Dissenters of the Peace and Senior High Courts respectively, that the guarantee of equality of opportunity for careers under Article 14(1) of the Constitution in matters relating to employment or appointment to any office under the State is confined to the stage when the career is seeking employment or competing for any post and has no application to matters arising when the career has proved service—such as promotion, selection for higher post, increase or reduction of salary, attachment or termination of service. I also hold, respectfully dissenting from the view of AGARWALA and RAMAN SWAMI, JJ. in *May Entores v. State of U. P.* (2) and following what I believe to be the view of the Supreme Court that Part III of the Constitution relating to fundamental rights transcends and controls within its own sphere every power under the Constitution and there are no exceptions except those specified in the Constitution itself. Accordingly, an employee who has been denied equality before the law or the equal protection of the law can appeal to Article 14, and if the State has discriminated against him for reasons of religion, caste, race, language, caste, promiscuity or on the ground of sex such as expressly banned by Article 12 he can invoke the protection of that Article.

and skill in the working of General Co-operative stores, which are under the charge of General Auditors. It is further stated that Cane Auditors hardly have any scope for promotion in their section. In other words, they are not likely to be called upon to fill posts of responsibility or undertake work of skill during their service. It was, therefore, not considered necessary to impose a similar test for the Cane Auditors. Mr. Prasad commented on the other hand, that the test was not being imposed on the Auditors in the General Section as a condition of promotion, but as a condition for receiving higher scale of pay. He pointed out that their work would continue to be the same, whether they pass the test or not. The only difference as a result of the test will be that some will receive a higher salary than others. He, therefore, argued that there was no reasonable connection between the classification and the object sought to be achieved.

Let us consider the validity of the test as if the Cane Auditors never existed. The Government would be justified in imposing a test on the old Auditors in the General Section in consideration of the benefits conferred upon them to which they were entitled by right. If they are placed on the same scale of pay as the new entrants, any distinction between the old and the new will be obliterated. In the future both classes will have the same opportunities of rising to the highest posts in their section. This is a concession to which they were already not entitled by right. Government could have left them in their old scale of pay, but they were generous enough not to take their stand on strict legal rights and obligations and extended to them the supervisory concession. In return for this, is not Government entitled to impose a condition, that the new benefit will be enjoyed only after passing a test? I think it is. If the pensioners dislike the condition, they can reject the Government's offer and continue in the old scale of pay.

Learned counsel contended that the pensioners did not object to the imposition of the test, but to the exemption granted to a class of Auditors without any

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justification. He emphasized that the two sections of the act were not identical responsibilities which required the same degree of skill. The Government had exempted one section from the test without any reason what soever. I am not at all impressed by this grievance. Who is to judge whether the responsibilities of the two classes of auditors are identical or not? Obviously, the ultimate judge is the Government, which runs both sections. They have intimate knowledge of the day to day working of each section and of its require ments. They are of the opinion that the work ing and working in the General Section is more difficult and complicated and requires a higher degree of skill. The Court cannot enquire into the wisdom or soundness of their decision. Even if the decision had been wrong and I think it is not, this Court would have no jurisdiction to set its enquiry or judgment upon a decision made in the exercise of a power which is within the exclusive sphere of the executive branch of the State. Governments have decided to confer a benefit upon the Auditors of both sections in which neither class was entitled by right. It will have the result of placing the persons on a par with the better qualified auditors to be recruited in the future. Government feels that the work of the General Auditors is more difficult and they will be better equipped to discharge their business responsibilities if they pass a test. This Court has no jurisdiction to interfere with a decision of the executive of this kind.

The real nature of their instrument is of a negative character. The target of this petition is not the test imposed on them, but the exemption in favour of others. That being so, this petition appears to be misconceived. Assuming for the sake of discussion that Governments have made a mistake of judgment while imposing a test on the General Auditors in exempting the Gen. Auditors who should also have been tested, what is the precise nature of this mistake? It does not lie in imposing a test on the General Auditors, which the Government considered necessary in their case and which they had the undisputed right to impose on the persons, in con-

reference of giving them the new scales of pay to which they were not entitled. The starting point of any argument in the present controversy must be that Government's decision to impose a test on the General Auditors was correct. The error, if any, must be in exempting the *Casa Auditors*, though a test was equally necessary in their case. The real grievance of the petitioners is that an exemption was wrongfully granted to the *Casa Auditors*. Even if that be so, what relief can be granted to the petitioners? I am afraid none.

Even if the Court had held that the exemption was unjustified, no relief could be claimed by the petitioners. They could not claim exemption from a test which is necessary in their case at any rate. Nor can they ask the Court to compel the Government to impose the test on the *Casa Auditors*, as this would be beyond the jurisdiction of the Court whose power to issue a writ of mandamus is limited to the enforcement of legal duties or obligations. There is no duty imposed by law or statute on the Government to impose a test which it does not wish to. This petition appears to me therefore to be misconceived. A citizen may invoke Article 226 for the protection of his own rights but not to prevent any other citizen from obtaining something to which he was allegedly not entitled (Cases of *five narrators and Indian corpora are exempted*).

The petitioners have however invoked Articles 14 and 16 and claimed exemption from the test on the name of equality of opportunity. They do not say that the test was unjustified. But they contend that the exemption was in favour of the *Casa Auditors* was wrongful, and as one section has been exempted, they are entitled to a similar exemption. Thus they have adopted a position somewhat similar to that of a candidate in an entrance test who does not obtain pass marks, but says: As the other fellow has been declared successful, so must I be. This is an incredible demand on the face of it. The petitioners appeal to the principle of equality under Articles 14 and 16 has been made with the object of dressing up this petition with the cloak of constitutional respectability.

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794 I hold that the action of the Government in im-
 posing a tax on the General Auditors while exempting
 the Cant Auditors was not discriminatory.

795 The State raised a preliminary objection that a
 joint petition containing a prayer for *revisión* could
 not be filed on behalf of 25 prisoners. There is some
 force in this objection, but I decided to hear the *amparo*
 case on merits in view of the far reaching importance of
 the issue raised. If the prisoners had filed separate
 petitions, they would have been used to *costas* separately.
 It is in the interests of justice that each prisoner should
 pay the costs which he would have paid under a separate
 petition particularly in view of the fact that the hearing
 of the petition lasted several days.

The petition is dismissed. The prisoners shall
 pay to the respondents costs calculated at the rate of Rs 5
 per each petitioner.

Mr. Brij Lal Gupta and Mr. S. C. Khare, appeared
 for some prisoners in the other connected petitions.
 Mr. Gupta stated that he adopted the arguments of
 Mr. Desai. Mr. Khare addressed me for a short time
 and gave general support to Mr. Desai's argument.
 Mr. James Simon, on behalf of the State, mainly relied
 on the judgment of Agueroza, J. in *Roy Krishna* (supra
 (1)) and also contended that Article 16(1) did not extend
 beyond the stage of initial employment.

Petition dismissed.

CIVIL REFERENCE

Before the Honourable O. H. Mathur, Chief Justice
and Mr. Jagan Nath

TIKA RAM (Plaintiff)

v

MAHESHWAR DIN AND OTHERS (Defendants)

Under Provisions Zemindari Abolition and Land Reforms Act
1950 s. 25(1), sub s. (2) and (3)—Jain entitled—*judicial*
case—Collector must decide—Civil Procedure Code 1908 s.
113—Reference when completed

A Collector or an Assistant Collector has no jurisdiction
to sit as judge on the view of the civil court remaining an
issue in the Collector and has to decide that issue in accordance
with the provisions of sub-s. (2) and (3) of s. 25(1) of the U.P.
Zemindari Abolition and Land Reforms Act

An opinion under s. 113 Civil Procedure Code is to be
sought when the court still has some doubts about the ques-
tion and not when the court has formed an opinion and acted
upon it and this opinion is disagreed with by another court

Pradhan Singh v. Gopal Prasad (1) derived from

Civil Reference No. 28 of 1958 made by R. C.
Arora the Munsif, Haridwar, in Original Suit No. 81
of 1955 by an order dated 15th January 1958

The facts appear in the judgments.

Standing Counsel (N. D. Pant) for opposite parties

The judgment of the court was delivered by—

DAVAL, J.—Original Suit no. 81 of 1955 for par-
tition and possession was instituted in the court of Munsif
Haridwar on the 16th of February 1955. One of the
issues framed in the suit was—whether the plaintiff is
co-owner of the land in suit along with defendants 1 and
2? On the 24th November 1955 this issue was
referred to the Collector, Jaunpur, for a finding in view
of the provisions of section 25(1) of the U. P. Zemindari
Abolition and Land Reforms Act, 1950 as amended by
section 18 of the U. P. Land Reforms (Amendment)
Act (XVIII of 1956).

The Collector, Jaunpur, transferred the case for dis-
posal to the court of Mr. Nirmal Chandra Jain, Assistant

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made a reference to the case of *Parvathidas Singh v. Gaya District* (1).

The Additional Collector, Jaunpur, has stated in his letter that the record of the civil court was returned to the returning court as the order of Sri Jinn was a judicial order and therefore could be set aside in judicial proceedings or by the High Court on a reference by the learned Munsif and that in an administrative capacity he could not have intervened in the matter.

We do not consider it necessary for the purposes of these proceedings to decide the question whether a reference of the case by the Munsif to the Collector was correct or not, as it is an opinion that the view of the learned Munsif on the question would be subject to attack on an appeal from his decree in the suit and that the Collector or the Assistant Collector was not competent to question the correctness of the view of the Munsif who had returned the case to the Collector for decision.

The Collector had no general jurisdiction over the subject-matter of dispute between the parties. His jurisdiction was limited to the decision of the issue referred to him by the provisions of section 332 B(1) of the Act, which as it stood on the 24th November 1935, read thus:

332 B. (1) If in any suit relating to land, instituted after the commencement of the U. P. Land Reforms (Amendment) Act 1934 in a civil court, or if instituted before the said commencement a decree had not already been passed the question arises or is raised whether any party to the suit is or on any material date was a ryot, whether as owner of the land and such question has not previously been determined by a court of competent jurisdiction, the civil court shall frame an issue on the question and return the record to the Collector for the decision of that issue only.

Explanation—A plea of being a ryot, addressee or owner which is clearly untenable need not be

1375
Tina, East
+
Majumdar
v. Jinn
Dm
Page 1

1959
Tax Act
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Income
Tax Act
Chapter I

only to test the jurisdiction of the civil court shall not be deemed to raise a question as aforesaid.

(2) The Collector when re-hearing the issue, if necessary, shall decide such issue afresh, and return the record together with his finding thereon to the civil court which submitted it.

(3) The Collector may instead of deciding the issue himself transfer it to a competent subordinate revenue court which shall after re-hearing the same if necessary, decide it and return the record with its finding thereon through the Collector to the civil court.

(4) The civil court shall deem proved its finding on the issue accepting the finding of the Collector or the subordinate revenue court on the issue referred to it.

(5) The finding of the Collector or subordinate revenue court on the issue referred to it shall for the purposes of appeal, be deemed to be part of the finding of the civil court.

This section lays down a particular procedure to follow when a plea of vested rights or admission rights is raised in a civil court. It is for the civil court to decide whether it had to refer an issue to the Collector or not. Its view may be wrong, but the Collector gets jurisdiction to decide the issue referred to him by sub-section (2) of section 332 B of the Act. He has no option but to decide the issue and return the record with his finding to the civil court. Of course he can re-frame the issue if necessary. The civil court has no option to ignore the finding of the Collector. It has to accept it and to decide the case accepting that finding. Further, such a finding of the Collector is deemed to be part of the finding of the civil court in view of sub-section (5) of section 332 B of the Act. We are, therefore, of opinion that the Collector or the Assistant Collector had no jurisdiction to act as judge on the view of the civil court respecting the issue to the Collector and had to decide that issue in accordance with the provisions of sub-sections (2) and (3) of section 332 B of the Act.

For the reasons stated above, we wish to repeat, do not agree with the view expressed by Mr. Justice V. D. Bhargava in *Amritlal Singh v. Gya Prasad* (1) referred to by the Assistant Collector in support of his view. That case came to this Court as a review under section 115 Civil Procedure Code and the learned Judge held that no application lay under that section. He however proceeded to express his opinion on the merits and held that the question of address rights raised to be a question of title during the pendency of the pending issue in the civil court on the promulgation of the U. P. Land Revenue (Amendment) Ordinance, 1954 in view of its section 5. The jurisdiction of the civil court under section 382 of the Act was not to decide any question of title but was to decide an issue referred to it by the revenue court and this jurisdiction did not arise by a subsequent provision that a question of address rights raised to be a question of title.

We therefore set aside the order of the Court dated the 28th of June, 1957 and direct that the record of the case be sent to the Collector, Jaunpur for the decision of the abovementioned issue. We make it clear that he will be competent to make it over for decision to an Assistant Collector, Firm Chaur.

Reference accepted

1957
 The Chief
 Justice
 of
 India

APPELLATE CIVIL

*Before Mr. Justice Bag and Mr. Justice F. D. Bhargava**

ARIDA REGAM and Others (Plaintiffs)

1969
March 25

**RENT CONTROL AND ELECTION OFFICER,
LUGENOW and Others (Defendants)**

Landlord and Tenant—Election of a portion of a house—Consent of the landlord—Rent of the landlord—No enquiry into the bona fide of the need—Order of the Rent Control and Election Officer, violation of—Rules 5 and 7 under the Rent Control and Election Act, 1962—Application of—Civil Procedure Code 1908 s 10—Order in the Rent Control and Election Officer, under of—Rent provisions scope of

The plaintiff appellants is the owner of a house of which the rent is payable in a part. On 12th August 1960 the plaintiff got possession of the room in execution of a decree for eviction against Raja Khadwan a tenant. On 14th August 1960 the plaintiff informed the Rent Control and Election Officer that he needed the room and prayed that it may be returned to him. The Rent Officer applied to the Rent Control and Election Officer that the room be allowed to Raja Khadwan for running a hotel shop. The Rent Control and Election Officer asked the landlord for particulars. On 18th August 1960 the plaintiff supplied the particulars and again prayed that he generally prefer the accommodation for his personal use and it should be allowed to him. On 19th August 1960 the room was allowed to Raja Khadwan without any evidence having been taken for the need of the plaintiff. On 24th August 1960 the plaintiff was informed of the order of 18th August 1960. On 25th August 1960 the plaintiff filed suit for injunction restraining the defendant no 1 Raja Khadwan from obtaining possession of the room in dispute under the allotment order passed in his favour by the Rent Control and Election Officer and in order of permanent injunction restraining the Rent Control and Election Officer the defendant no 1 from enforcing the order of allotment. The defence of defendant no 1 was that the suit is barred for want of notice under s 80 Civil Procedure Code and is also barred under s 11 and 16 of the United Provinces Code of Rent and Eviction Act that the allotment order has been validly passed in favour of defendant no 2 and that the plaintiff has no cause of action against the defendant no 1. The defendant no 2 did not file any written statement. The defence by the first defendant and the lower appellate

court also dismissed the appeal and the learned single Judge also held that the suit was barred. A special appeal is filed.

1931
Smt. Nirmal
Singh vs.
Rani
Ganga
and
Rajmoh
Lal Singh
Lahore

Held, (i) that there is nothing on the record to show that the Rani Chanda and Division Officer were asked to prepare any lease plan of the lands of the landlord nor did he issue a notice to the landlord when only one of the rooms of the house had fallen vacant. Hence the order of the Rani Ganga and Division Officer has been passed without compliance of the rules framed under the Act.

(ii) That the right of the plaintiff to occupy the house was a valuable right. If he needed it how did he had under the rules a right to allotment as two houses for that purpose a notice was absolutely necessary which was not given to him. Besides as required by rule 7 no enquiry was made from him about the desirability of the tenant.

(iii) That where an order is to be passed under rule 4 b or 7 of the Act then the proceedings are of a quasi-judicial nature the order itself would be of a quasi-judicial nature and if the provisions of the Act are not followed or even if the principles of natural justice are not followed the order would not be reasonable.

Rani Nirmal Tiwari v. Rani Chanda Sharma (i)

Chanda Shri v. Rani Ganga and Division Officer (ii) appeal (i) refused on

(iv) that since the disputed room is in a portion of the house wherein the appellants are themselves living they would be more reluctant to have that kind of shop in their house where all sorts of undesirable people might come and under the circumstances the allotment order is bad in law.

Shankar Sharma v. Rani Ganga and Division Officer (i) refused on

(ii) that there cannot be the least doubt that the order of allotment has been made without the consent of the landlord and hence the order is bad in law.

Pran Nirmal Tiwari v. Ganga Chanda Sharma (i) appeal on

(ii) that it has been so often decided as to have become almost an axiom that in public situations which call for necessary propriety or stability may have a compulsory force where the thing to be done is for the public benefit or on the advancement of public justice.

(i) 1931 A. L. J. 31

(ii) 1931 A. L. J. 333

(i) 1931 A. L. J. 410

(ii) 1931 A. L. J. 37

- 1952
 Raj AGRA
 vs.
 State of U.P.
 and
 Rajendra
 Prasad,
 Respondents
- Raj v. Police Commissioner* (3)
Justice Sankar Jaiswal v. The Lord Bishop of Oxford (7)
State of U.P. v. (Munshi) Lal Prasad (3) relied on
 (iv) That the order of the Raja Control and Revenue Officer cannot be supported as it is in direct breach of rules 3 and 7 of the Act
 (vii) That the case is not barred under ss. 48 and 49 of the U.P. Contract of Raja and Revenue Act
Ram Chandra v. The District Magistrate of Aligarh (9) relied on
Secretary of State v. Miah and Co. (3) followed
 (ii) that as far as the defendants no. 1 is concerned no relief can be granted as the suit itself is barred under s. 48-Card Procedure Code was not given but as against defendant no. 2 he would be restricted from taking possession of the premises under the aforesaid order which has been passed
Shepherd v. Secretary of State (3) relied on
 (i) that although it may not be possible for this Court to grant a decree as the suit has this Court has a jurisdiction under Art. 225 of the Constitution to grant the relief as against the defendant no. 1 even though this matter has not come up as yet, jurisdiction on application under Art. 225 because of its the office of the Raja Control and Revenue Officer the other man only continues as lawyer of defendant no. 2 who is prevented from taking possession. There is likely to be a conflict and it may be difficult for the Raja Control and Revenue Officer to have any further allotment order

Special Appeal no. 13 of 1957 against the decision of *Munshi, J.* dated 29th April 1957

The facts appear in the judgment

Amarendra Nayal for the appellants

Junior Standing Counsel and E. S. Farver for the respondents

The judgment of the Court was delivered by—

V. B. BHARGAVA, J.—This is a special appeal against the decision of a learned single Judge of this Court in a second appeal filed by the plaintiff who had filed a suit for injunction restraining the defendant no. 2, Raja

CC L.B. 1 (1957) 10 C.R. 456
 (1957) 10 C.R. 456
 (1957) 10 C.R. 456

CC L.B. 1 (1957) 10 C.R. 456
 (1957) 10 C.R. 456
 (1957) 10 C.R. 456

Kishorean from obtaining possession of the room as dispute under an allotment order passed in his favour by the Room Control and Eviction Officer, Lucknow, and an order of permanent injunction restraining the Room Control and Eviction Officer, defendant no 1, from enforcing the order of allotment in favour of Ram Kishorean.

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 Officer,
 Lucknow
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The suit was dismissed by both the courts below as well as by the learned single Judge. Hence this special appeal.

The plaintiff Abhan Sahel came on the allegation that he was the owner of a certain house of which the room as dispute was a part. He was an occupation of the entire house except this room. He had previously been let out to one Nand Kishore about 12 or 13 years back from the date of the suit. After some protracted litigation, the appellant was able to get a decree of ejectment against Nand Kishore and after execution of the decree he obtained actual possession of the room on 13th August, 1950.

On the next day i.e. on August 14, 1950, the plaintiff informed the Room Control and Eviction Officer of the vacancy and prayed that the room should be released in his favour as he required it for his own needs. It is common that that one Shyam Sunder made on the same day an application that there was a boy Ram Kishorean whom Shyam Sunder knew, and therefore he requested the District Magistrate that the room should be allotted to Ram Kishorean because Ram Kishorean wanted to start a hotel shop. On the same day the Room Control and Eviction Officer asked the landlord to supply the particulars of the accommodation.

On August 16, 1950, the plaintiff supplied the particulars and again made a request that he personally need of the accommodation for his personal use and it should be allotted to him. Thereafter, according to the plaintiff, he was never asked to produce any evidence about the bona fide needs of the plaintiff, but, on the other hand, on August 19, 1950, the room was allotted to Ram Kishorean and on August 24, 1950, intimation to this

For
the
defendant
Mr. J. S. Gopal
for
the
plaintiff
Mr. S. P. Srinivasan

effect was communicated to the plaintiff. The plaintiff on the next day, that is August 25, 1945, filed the suit.

On behalf of the defendant no. 1 the Rent Control and Eviction Officer it was contended that he had acted on behalf of the Executive Government and the suit was not maintainable for want of notice under section 55, Civil Procedure Code that the suit was barred under sections 13 and 15 of the U. P. Control of Rent and Eviction Act. (Act III of 1947) that the allotment order had been validly passed in favour of the defendant no. 2 when the accommodation fell vacant and the plaintiff had no cause of action against defendant no. 1. Defendant no. 2 did not file any written statement, though he was present throughout the proceedings. The trial court and the lower appellate court held that the suit was bad for want of notice as against defendant no. 1 and the first two courts as well as the learned single Judge here held that the suit was barred under sections 15 of the U. P. Control of Rent and Eviction Act.

In appeal it has been contended that the order passed by the courts below was in direct defiance and in breach of the rules made under the U. P. Rent Control and Eviction Act which were binding upon the Rent Control Officer. Particular reliance was placed on rules 6 and 7 made under the Act which are as follows:

6. *Occupation by landlord*—When the District Magistrate is satisfied that an accommodation which has fallen vacant or is likely to fall vacant is now, or is needed by the landlord for his own personal occupation the District Magistrate may permit the landlord to occupy it himself.

7. *Allotment of a portion of accommodation*—When a portion of accommodation falls vacant and the owner is in occupation of another portion thereof the District Magistrate shall before making the allotment order consult the owner and shall as far as possible make the allotment in accordance with the wishes of the owner."

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The Joint
Deputy
Commissioner
and
Revenue
Officer
Ludhiana
vs.
V. D.
Majumdar,
I

In that case there was nothing in the order of allotment to show that the Rent Control and Eviction Officer exercised his mind as to the point whether the need of the landlord was of a bona fide character or not and the Rent Control and Eviction Officer had not consulted the landlord when he was allocating a major portion of the house and only a minor portion of it was to be allotted. We respectfully agree with the observations made by the learned Judges in that case and in the present case also we find that there is nothing on the record to show that the Rent Control and Eviction Officer ever failed to enquire into bona fide of the needs of the landlord nor did he make a notice to the landlord when only one of the rooms of the big house had fallen vacant. There, too, in that case the order of the Rent Control and Eviction Officer had been passed without compliance of the rules.

The second case relied upon by the learned counsel which is reported as page 416 of the same volume is also a *bona fide* decision where it was held:

When the Rent Control and Eviction Officer decides a question of fact the result of which determines the right of a person to the benefit of rule 4, he acts in a quasi-judicial capacity. Although the act of making an allotment order may be administrative act, the considerations which must precede the doing of that act in a case (such as the present) in which the rights of one party depend upon the existence of a particular state of facts is of the nature of a quasi-judicial consideration. He cannot make that decision in his discretion but must reach his conclusion after hearing the persons whose rights are likely to be affected and after giving them a full opportunity of placing their case before him. This has not been done in the present instance and the order of the 6th June cannot, therefore, in our opinion be sustained.

In that case actually it was rule 4 which was under consideration. Where rights of parties are affected, as has been held in that case, we respectfully agree that the

proceedings are of quasi-judicial character. In any event, the principles of natural justice are to be followed, and an opportunity, in that event, should be given to the parties to produce their evidence, and the decision should be arrived at after due enquiry. If the order of the Rent Control and Eviction Officer is a pure and simple order of eviction, that may be purely an administrative order. But if an order is to be passed under rules 4, 5 or 7, then, in that event, since the proceedings are of a quasi-judicial nature, we think the order itself would be of a quasi-judicial nature and if the provisions of the Act are not followed or even if the principles of natural justice are not followed, the order would not be sustainable.

In the present case, the right of the plaintiff to occupy the house was a valuable right. If he needed it, he had under the rules a right of allotment in his favour. For that purpose a notice was absolutely necessary which admittedly had not been given to him. Secondly as required by rule 7, as has already been mentioned, no enquiry was made from him about the desirability of the tenant.

In the third decision rendered in *Shahin Chowdhury v. The Rent Control and Eviction Officer* (1) wherein the object of rule 7 has been mentioned, it was held:

In our opinion the purpose of this rule (rule 7) is to avoid, as far as possible, the friction and difficulties which may arise in those cases in which an owner has, in effect, to share his house with a tenant of whom for some reason he may disapprove, and that when the rule provides that the Rent Control Officer shall consult the owner, it means that the owner has to be consulted as to the suitability of the proposed tenant.

This authority also fully supports the contention of the plaintiff. It was argued by the learned counsel for the plaintiff that here the allotment has been made in favour of one Ram Kabeer for opening a food shop. There all sorts of undesirable people might visit

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 RAY KUMAR
 BHOWM
 V.
 RAMESH CHANDRA
 AND
 GOVERNMENT
 OFFICERS
 LICENSURE
 BOARD
 V. D.
 BHARGAVA
 J.

become almost an axiom that in public statutes words only directory, permissive or enabling may have a certain publicity here where the thing to be done is for the public benefit or an advancement of public justice. It was so held in *Reg. v. Tithes Commissioners* (1).

In *Forster v. Gaudier* (2) *Jain v. The Lord Bishop of Oxford* (3) at page 215 Lord Eversham had held:

But there may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed, to exercise that power when called upon to do so.

In *State of U.P. v. Munirudhan Lal Srivastava* (4) three Lordships, quoted Crawford on Statutory Construction—Art. 263 at page 518:

The question as to whether a statute is mandatory or directory depends upon the intent of the Legislature and not upon the language in which the intent is clothed. The reasoning and intention of the Legislature must govern, and these are to be ascertained not only from the phrasing of the provision, but also by considering its nature, its design, and the consequences which would follow from construing it the one way or the other.

Thereafter they held:

On the other hand it is not always correct to say that where the word 'may' has been used the statute is only permissive or directory in the sense that non-compliance with those provisions will not render the proceedings invalid.

Counsel for respondents no. 2 Ravi Narayan had placed reliance on a Bench decision of this Court in

(1) 11 B. 546 (14 Q. B. 429).

(2) 1 B. 347 (189) 1 A.C. 224.

(3) 21 B. 102 (4-5) 82.

1930
 Ray, Justice
 Broom
 Ray
 Crompton
 and
 Forster
 O'Connor
 Gaudier
 Y. D.
 Narayan.

1959 *Ram Dattar v. Dist. Control and Revenue Officer, Faizpur*
 (1) where their Lordships were considering rule 3 and
 it was held that rule 3 was not mandatory, it was only
 directory. They held that—

“The
 District
 Magistrate
 is
 empowered
 to
 make
 rules
 for
 the
 purpose
 of
 the
 Act.”

There is no restriction imposed by the Act with regard to the period within which an order shall be made, and in our opinion the State Government has no power to impose such a restriction by a rule. Under section 17 of the Act the State Government is empowered to make rules to give effect to the purposes of this Act. The purposes of the Act are to control the letting and the rate of available accommodation, and to prevent the creation of tenures therefrom, and we are unable to hold that a rule which severely restricts the powers of a District Magistrate to control the letting of accommodation conferred upon him by the Act can properly be described as a rule giving effect to the purposes of the latter.

If the meaning of the decision was that the power of the District Magistrate under section 7 could not be regulated by the rules at all, then in that event, we respectfully disagree with the aforesaid decision. We might have been inclined to refer this question to a larger Bench but since technically that authority has been given under rule 3, and there are already several decisions of this Court where rules 6 and 7 have been held mandatory, it is not necessary for us to refer this matter to a larger Bench.

The power which has been given under section 7 (2) to the District Magistrate is wholly unqualified power and it may result in placing an absolute restriction on the enjoyment of the property by the landlord. If that action had been by itself it might have been liable to be challenged under Article 19(1) (f) of the Constitution which provides

- 19 (1) All citizens shall have the right
 (f) to acquire, hold and dispose of property.”

(1) 13-5 (1951) at 261

This fundamental right, which has been given, is subject to sub-article (5) which lays down

Nothing in sub-clauses (d), (e) and (f) of the said clause shall affect the operation of any existing law in so far as it imposes or permits the State from making any law imposing reasonable restrictions on the exercise of any of the rights conferred by the said sub-clauses either in the interests of the general public or for the protection of the interests of any Scheduled Tribe

A landlord could either let it out to the tenant and enjoy the rent or he could occupy it himself and thus hold it and enjoy the occupation of the house. In the first case whether a tenant is A, B or C, P is concerned. His right to the property is unaffected, if he gets the rent, but in case he wants to occupy the property himself or himself with somebody else then, in that event, if he is stopped from occupying it himself, his right to hold the property would be affected.

Section 7 (2) of the U. P. Control of Rent and Eviction Act provides

The District Magistrate may by general or special order require a landlord to let or not to let to any person any accommodation which is or has fallen vacant or is about to fall vacant

This action as we have already mentioned is in too wide terms and there are no restrictions imposed on the exercise of his discretion, and that being of subjective nature it is also not justiciable. Therefore, unless they were qualified and the manner in which that right would be exercised would be indicated, this section according to us, would infringe the fundamental right of the owner. It was for the purpose of giving effect to the Act that rules were framed under section 17 and therein it was provided how his discretion was to be exercised. These, then, in our opinion, the rules, which had been framed, in order to control and regulate the discretion under section 8, have been made in order to give effect to the Act.

1955
Sgt. Arora
J
Sgt. Chandra
J
Srinivas
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V. D.
Munshi,
J

194
 The Act
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 as
 the
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 and
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 of
 Tenants
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 1947
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The Act had been framed for the purpose of control of tenancy and the want of residential and non-residential accommodation and to prevent evictions of tenants therefrom. The Act was not in any way framed to affect the rights of the owners to occupy the house if they so desired and if they were actually in need of it themselves. The main object of the Act as stated in the preamble was that the landlords may not charge a higher rent or if they have to let out, may not choose the tenants. Rule 3 which provides that the allotment should be made within thirty days is a mere salutary rule. A landlord is entitled to the rent from the date a house is vacated. If rule 3 was not there, it was open to the District Magistrate not to pass an allotment order for one, three or even five years or to direct the landlord not to let it out to any person till further orders. Thus the landlord would lose his rent and his right to hold and enjoy the property would be so seriously affected as to result practically in the non-employment of the property. Therefore a reasonable discretion was placed, among others, that in case the Rent Control Officer is not able to allot, it was open to the landlord to nominate a tenant to whom the accommodation will be allotted. In that event it could not be said that the landlord would lose on account of the action of the District Magistrate. Even in that case, he could allot it to somebody else if he could give valid reasons for so allotting.

Similarly, rules 6 and 7 have been made to preserve the right of the landlord, if he wishes to occupy the house himself or to choose a tenant if he is the occupant of a portion of it.

The action under section 7 which is taken by the District Magistrate is primarily in the exercise of an administrative action and in our opinion it is within the competence of the Legislature to delegate its authority to the Government to frame rules in accordance with which that administrative discretion would be exercised. That discretion is not primarily of a judicial nature and in our opinion it is always open, if the Act so provides, to provide the rules. When once that authority is

delegated as in the present case we think it has properly been delegated, the exercise by the State Government of that power would be an exercise of that power by the Legislature itself and it would be second as if the rules had been expressed in the Act itself as the Act itself. It was so held in *National Telephone Company v. State* (1).

The rules can be challenged—

- (i) If they are not reasonable and not convenient for carrying out the Act, was effect
- (ii) if the rules relate to matters outside the scope of the Act,
- (iii) if they relate to matters not provided in the Act, and
- (iv) if they are inconsistent with the provisions of the Act.

Here we find that the State Government, in framing these rules had neither exceeded their powers, nor the rules are unreasonable or inconvenient. In the circumstances we think that the rules made under the Act when they had been made for the purpose of giving effect to the Act should be deemed to be part and parcel of the Act itself.

From the above discussion it is clear that the order of the Rent Control and Eviction Officer cannot be supported as it was in direct breach of rules 6 and 7 of the provisions.

The next question is whether sections 15 and 16 of the Rent Control and Eviction Act bars the suit. So far as section 15 is concerned, no suit or proceeding is taken against any person for anything which is done in good faith. In this case it is the order itself which is being challenged and no suit for damages has been filed against the State for any wrong. Therefore section 15 does not come into play. As regards section 16, learned single Judge had held that the suit was barred on its account. Section 16 of the Act provides

No order made under this Act by the State Government or the District Magistrate shall be

(1) L. R. (1952) 2 C.W. 199 (2).

1952
 May 22/52
 Appeal
 from
 District
 Court,
 Allahabad
 V. State
 of U.P.

125
 See also
 Section
 2
 of the
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 Section
 125
 of the
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 Section
 125
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called in question in any court

Section 16 of the U. P. Control of News and Eviction Act very much corresponds to section 16 of the U. P. (Temporary) Accommodation Regulation Act (Act XVI of 1947) and the word question had come for interpretation before this Court in a Divisional Bench case in *Sh. Ram Chandra v. The District Magistrate of Aligarh* (1) and the Bench came to the conclusion that the word question means called in question as regards its reasonableness or practicability and could not mean challenging its legality. It was held:

Where the authority exceeds the powers conferred upon it or makes an order disregarding the conditions subject to which and the limits up to which it can give an order, the civil courts can usually interfere. The power of the civil courts to question whether the order was ultra vires or ultra vires the authority making it is not taken away by the section.

In *The Secretary of State for India v. Council v. Raj Jaiendra Nath Choudhary* (2) their Lordships of the Privy Council held:

The words of this statute imposing finality upon the orders of the Board of Revenue in such a sense turn upon to their Lordships not only in its express, but also in its implied

Two conditions, however, must be noted: the first is that measured by that fundamental irregularity, that is to say, a defect of or non-compliance with the essentials of the procedure would still give ground for questioning the proceedings in a court of law.

Here in the present case the question is whether there had been an irregularity by direct defiance or non-compliance of the rules 6 and 7 or not. If there has been then in our opinion the civil courts would have jurisdiction to interfere and the finality placed by section 16 would no longer be available as defence.

IN CHAMBER

(1) A. S. & H. S. P. L. 10

In *Secretary of State v. Miah & Co.* [1], their Lordships of the Privy Council had held

It is settled law that the evidence of the jurisdiction of the civil courts is not to be readily inferred but that such evidence must either be explicitly expressed or clearly implied. It is also well settled that even if jurisdiction is so excluded the civil courts have jurisdiction to examine suits where the provisions of the Act have not been complied with or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure.

We, therefore, think that the learned single Judge and the court below were not right in holding that section 16 of the Act barred the present suit.

Learned counsel for defendant no. 1, the Rent Control Officer, had contended that so far as he is concerned, as no notice under section 88 Civil Procedure Code, had been given the suit as against him was bad and, therefore, so far as he is concerned, no order could be granted as against him. Formerly there was a conflict of decisions as to whether section 88 applied to suits whether the relief claimed was of proprietary nature or not, but now this matter has been set at rest in *Bhagchand v. Secretary of State* (2), which has approved the view of Calcutta, Allahabad and Madras decisions and which has held that this section applies to all kinds of suits. Therefore, so far as defendant no. 1 is concerned, no relief could be granted in the suit itself, but the relief certainly can be granted as against defendant no. 2 that he would be restrained from taking possession of the premises under the allotment order which has been passed.

It may not be possible for us to grant a decree in the suit but in spite of that fact we think that this Court has a jurisdiction, under Article 226 of the Constitution to grant the relief as against the defendant no. 1 even though the matter had not come in its own jurisdiction or an application under Article 226. This we think

188
 (1) *Secretary of State v. Miah & Co.*
 (2) *Bhagchand v. Secretary of State*
 (3) *Calcutta, Allahabad and Madras decisions*
 (4) *Article 226 of the Constitution*
 (5) *Article 226 of the Constitution*

THE
RAN CHAND
PRITHI
v.
RAN CHAND
AND
BHOJAN CHAND
LADKARI
v. B.
MAGRAH

merely because if it is the effect of the Ran. Chand Order the allotment order contained in favour of Ran. Bhodan and Ran. Bhodan is restricted from taking possession, there is likely to be a conflict and it may be difficult for the Ran. Chand Order to have any further allotment order.

Therefore, we allow the appeal, set aside the decree of the courts below and make a declaration in the Ran. Chand and Bhodan Order. Ladkari is not in accordance with law and decree that defendant no. 2 be restrained from taking possession of the property. The respondent no. 1 shall give full opportunity to the plaintiff to consider his needs and if he comes to a conclusion that it is genuinely needed by the appellant he may allow the premises to him. In case he finds that the need is not genuine, he will consult the landlord as to the terms on which it should be allowed and the allotment order shall be made as far as possible to the comfort of the landlord. The appellants are entitled to their own throughout from defendant no. 2. The defendant no. 1 shall bear his own throughout.

Appeal allowed.

CIVIL MISCELLANEOUS

*Before Mr. Justice Mukherjee**

BOODAN (Petitioner)

v.

ASSISTANT COMMISSIONER GENERAL, EVACUEE
PROPERTY AND ANOTHER (Respondent)

United Provinces High Courts Jurisdiction Order, 1941,
of 14 1949 of— Civil wrong within the area, meaning of

Two of land in respect of which proprietary rights were claimed and in respect of which the order of the Assistant Commissioner General was made were known as Moring, which is not one of the areas over which the Lucknow Bench exercised jurisdiction.

*Simpson, Lucknow.

Held, that the case, out of which this petition has arisen did not arise within the area, viz., which the Linklater Branch could exercise jurisdiction under the provisions of clause 14 of the Amalgamation Order.

Names of Petitioners: Messrs Charles Dal Rous & Co. (2) related on.

This Petition was filed in 1934 under Article 225 of the Constitution of India.

The facts appear in the judgment.

R. S. Sharma for the applicants.

G. T. Wadhawan for the opposite parties.

MURRAY, J.—This is a petition by another group, asking for a writ of mandamus or any other appropriate writ or order to be made by this Court against the Assistant Canadian General commanding them to produce the record of the case referred to in the petition and thereupon to quash the order made by the Assistant Canadian General on the 18th January 1933.

It appears that in respect of certain plots of land 4½ acreish rights were claimed. These plots of land were encroached upon, and under the law, Aboriginal rights in respect of estate property could only be granted by the Controller of the Estate Property on the satisfaction of certain conditions. Certain orders were made by an Assistant Canadian (Judicial) J. Murray. Thereafter a petition in revenue was made and final orders on that revenue appear to have been made by the Assistant Canadian General. The Assistant Canadian General happened to be functioning as Linklater.

A preliminary objection was taken on behalf of the respondents to the effect that this petition was not maintainable by the Linklater Branch of the Allahabad High Court on the ground that the case, out of which this writ petition had arisen did not arise within the area over which the Linklater Branch could exercise jurisdiction under the provisions of clause 14 of the Amalgamation Order. It was pointed out in this connection that

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1919
Badley
 v.
Assistant
Commissioner
of
Police
Alibabad
Dist.

The place of birth in respect of which Khawadhar Singh was claimed and in respect of which the order of the Assistant Commissioner General had been made were within a District which was not one of the areas over which the Lucknow Bench exercised jurisdiction. Reference was placed on a decision of the Court in 1915 between Badley Ram v. Deputy Commissioner of District (1), wherein a Bench of this Court of which I had the privilege of being a member held that the Lucknow Bench could validly exercise a petition for writ only when a case arose within an area which was amenable to the jurisdiction of the Lucknow Bench under the Amalgamation Order. Badley Ram's case was a correct one, for there the origin of the dispute or the origin of the case was in Gorakhpur which was admirably within the jurisdiction of the Lucknow Bench, but the order—the final order which was the subject of challenge in the present petition—was made by the Acting Commissioner at Alibabad where he had his permanent office. In Badley Ram's case the preliminary objection was raised on behalf of the respondents and the preliminary objection was on the ground stated above rejected by the Bench. I am bound by the Bench decision in Badley Ram's case but Mr. Ghose, who appeared on behalf of the present petitioner Boodan, contended that he was not bound by it and that he could argue to show that the decision in Badley Ram's petition was incorrect or at any rate needed re-consideration. Since I was a party to that decision, I was most anxious to know from Mr. Ghose, where we had gone wrong in Badley Ram's case. I therefore let Mr. Ghose say all he had to say in regard to the rather important question.

The main contention of Mr. Ghose was that the decision in Badley Ram's petition proceeded on the assumption that clause 14 of the Amalgamation Order was ultra vires the Constitution. It is undoubtedly true that in Badley Ram's case nobody contended that clause 14 of the Amalgamation Order was in any manner put in jeopardy by any constitutional provision. What

Mr. Dixon contended that that when the Amalgamation Order was drawn up (a period of 10 or 12 years) there were no constitutional guarantees for the citizens and, therefore, when the framers of the Amalgamation Order used the word case in clause 14 of that Order they only had in mind such cases as could have arisen at that time. Mr. Dixon contended that they could not possibly have thought of cases which could arise subsequently for the enforcement of the constitutional guarantees and they could not therefore contemplate cases under the new jurisdiction which was conferred as in Article 136 of the Constitution. Mr. Dixon's contention was that in interpreting a provision of law one has to bear in mind the circumstances under which that law was made and one has also to bear in mind the extent of the enactment. No one can have any dispute with the broad proposition of interpretation on which Mr. Dixon relies but the difficulty was when Mr. Dixon attempted to put into use the aforementioned principle of interpretation in showing that clause 14 of the Amalgamation Order did not mean what it purported to mean or the meaning of clause 14 of the Amalgamation Order was some thing different from what a mere reading of that clause showed. I tried to follow Mr. Dixon's argument with care but I failed to see any appropriate grounds on which I could accept that argument. Clause 14 of the Amalgamation Order speaks of cases arising in a particular area. It also speaks of the jurisdiction and powers for the same being vested in the new High Court. The reference to jurisdiction and power for the same being vested must in my opinion, refer to all such powers and jurisdictions of the new High Court as it possessed by virtue of being a High Court, whatever those powers and jurisdictions were there at the time when the Amalgamation Order was made. It is true knowledge that laws of the type of which the Amalgamation Order was one not meant to have permanent effect. They are not like those laws which once made keep on being changed according to the exigencies of the situation by Legislative amendments. The Amalgamation Order was a kind of Charter which created

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the new High Court of which the Lucknow Bench was an integral part. The Amalgamation Order replaced what was called the Letters Patent of the Allahabad High Court. The old Allahabad High Court had been created as we know under the Letters Patent. The new High Court, viz. the High Court that came to existence by the Amalgamation of the Chief Court of Awadh and the High Court of Judicature at Allahabad, came into existence by the United Provinces High Courts (Amalgamation) Order 1948. Therefore it was in the nature of a Charter of this Court. If the argument of Mr. Dhanoo were accepted namely, that clause 14 of the Amalgamation Order had nothing to do with the very jurisdiction of this Court or in other words clause 14 of the Amalgamation Order did not affect in any manner except the power of the Courts to try cases and dispose of writ applications which could be filed under the provisions of Article 226 then it would amount to saying that a part of the jurisdiction entrusted by this Court—and a very important part at that—was being exercised independently of the Amalgamation Order which as I have shown above was the parent or mother of the new High Court. This Court existed as a High Court at the time when the Constitution came into effect so that this Court could exercise any of the powers which were conferred on High Courts under Article 226 of the Constitution.

The next contention of Mr. Dhanoo was that the word *case* in clause 14 of the Amalgamation Order did not refer and it could not refer to writ applications, which according to Mr. Dhanoo were something different and outside the contemplation of the word *case* and therefore he contended that even if clause 14 of the Amalgamation Order was valid even so it could not affect writ petitions and that writ petitions could be filed at the pleasure of the judges at any of the two places, namely Lucknow or Allahabad. I have seen no reason to hold that the word *case* could not or did not include a writ petition. As was pointed out in *Radcliffe-Pain's case* the construction of the word *case* was

different from the construction of the word *appeal* or *proceeding*. The construction of the word *case* varied under different circumstances and I have no doubt in my mind that writ petitions could very well come within the meaning of the word *case* in clause 14 of the Amalgamation Order.

The next argument of Mr. Ekeola was that in respect of a writ petition it could not be contended that if the writ petition was a *case* then it arose anywhere except where an order was made which the petitioners challenged by the writ petition. If the order which was being challenged had its first origin at the place where it was made then there was no difficulty in holding that the origin of the case in respect of that particular order was the place where that order was made but where the order which was being made the subject of challenge in the writ petition was the culmination or was the ultimate order made in a case which arose somewhere else earlier, then in attempting to determine where the case in respect of a particular writ application arose one had to find out the place of origin of the case which culminated in to speak in the order which was being challenged by the writ petition. It was pointed out in *Bedder Barn's* case that in respect of that case Gordon was the place of origin because it was there that the action of the excise stops took place while Allahabad was the place of culmination of that dispute because it was at Allahabad that the Excise Commissioner made his ultimate order.

Clause 14 of the Amalgamation Order did not in any manner affect either by curtailment or in any other way the jurisdiction which was conferred on a High Court. One has clearly to see the distinction between power and jurisdiction and the manner in which the power is to be exercised in respect of a jurisdiction. Under Article III of the Constitution, the jurisdiction of and the law administered in any existing High Court, and the respective powers of the judges thereof in relation to the administration of justice in the Court included any power to make rules of Court and to regulate the sittings of the Court and of members thereof among

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done as in District Courts was to remain the same as was immediately before the commencement of the Constitution. This Court like any other court, did make rules whereby the writ petitions filed against orders made in courts, were to be heard by certain Judges or heard by Judges sitting at a certain place and if that could be so then I do not see any reason why the Appellate Jurisdiction Order by clause 14 should not prescribe a place for receiving of petitions or even an appeal arising in certain cases at one place and another place for receiving petitions etc. arising in another area. In this connection I may also make a reference to the decision in *Upendra v. Indar v. Meera Chandra Lal Ram Jaisiri* (1). In this Full Bench decision it was held that the Judges sitting at Lucknow could deal only with cases arising in Allahabad and that among those they could not deal with cases arising outside Allahabad in respect of cases arising in Allahabad they could exercise all the powers and jurisdiction which is vested in the High Court for the time being.

For the reasons given above, I have come to the conclusion that the preliminary objection in this case should prevail and that the petition could not be filed and heard by the Lucknow Bench.

I accordingly direct that this petition be returned to Mr. Dhawan for presentation at Allahabad.

Petition returned for proper presentation

(1) 1 L. R. (1958) 240-72

CIVIL MISCELLANEOUS

*Before Mr. Justice Tandon**

MOHAMMAD YASIN (PETITIONER)

V

SUPERINTENDENT OF POLICE, SETAPUR
AND OTHERS

(CIVIL PETITION)

300
100

History short—Confirmed as professional exemption? *P. Police Regulation 195* scope of administrative action, provisions of the Government of India, 1950 Act 195 scope of

Held that the jurisdiction to issue a history short under Regulation 195 arises from the fact that a particular person is considered or thought to be a confirmed or professional criminal for which there should be some basis or material

If in any particular case there is complete absence of any such material the action in issuing a history short will not only be illegal but also without jurisdiction

Held further that although the issuing of a history short is purely an administrative action and, ordinarily, the High Court will not interfere in administrative actions where the action taken is on the face of it arbitrary or capricious and is without jurisdiction the power of the High Court under Article 226 are not wanting

Civil Miscellaneous Writ No. 10 of 1958

The facts appear in the judgment

Kishor Marwaha for the applicant

The Standing counsel for the opposite parties

TRAVES, J.—The petitioner is one Mohammad Yasin who is employed as a peon under Mahmoodabad Estate. He is in the service of the Estate from his boyhood and gets a salary of Rs 50 per month besides another Rs 30 as Paltadar of one of the Mahagans at Mahmoodabad. He also owns a bullock cart and a couple of bullocks from which too he makes some earning

*Sitting at Lucknow

1949
 Anonymous
 Victim
 in
 connection
 with
 the
 Punjab
 Police
 Report
 No. 100-1

A cattle market is held at Chanderpur in Multan District. Even under the direction and control of the Inspect Muhammad Yousaf Khan, in the course of his duty as police officer of Multan District, to attend this market. In March 1933 an anonymous complaint reached the Superintendent of Police, Sargodha, stating that some cowboys had been in the market, to the effect that Muhammad Yousaf Khan who looks after the arrangements in this market causes pick-pocketing and commission taking. (Gharibzadeh aur hazaar ke andar chalak chalte hain) to be done. An instance in regard to stealing of cow bullocks belonging to one Brahmin was also cited in which, it was alleged, that Bhai Nandh considerable brushed up the matter after accepting illegal gratifications from Fakir. The bullocks claimed by Brahmin were stated to have been stolen by his own brother-in-law who was apprehended while he was trying to dispose them off to a purchaser in the market. The Superintendent of Police made the following order in the anonymous petition:

I will look in the anonymous complaint.
 Please conduct an enquiry.

One Ram Mohan Singh Assistant Complaints Officer,
 then held an enquiry in pursuance of the above order.

His report is Annexure 2.

It appeared from it that Mr. Ram Mohan Singh transcribed several persons in the course of the enquiry including the petitioner. A summary of their statements was included by him in his report also.

It was clear from this report that the main incident, namely that two bullocks were sought to be sold by Fakir to a purchaser in the bazaar and that Brahmin accused at the spot while the transaction was still proceeding, was found to be correct by the investigating officer. The petitioner too admitted that he was present in the bazaar where Bhai Nandh considerable apprehended the two bullocks and took them to the police station. That he stated that he accompanied Bhai Nandh to the police station where, according to Sri Ram Mohan Singh, they were released by Bhai Nandh after accepting money from

Birkens who was their owner. The report also stated that Fisher was even brother in law of Birkens, hence the latter was anxious to protect him from prosecution, etc and there was little chance of evidence being forthcoming. The report which he, therefore, ultimately submitted was that a case against Ray Nash was difficult to be proved but at the same time he recommended that a history sheet might be opened in the case of the petitioner. As a result the history sheet, the subject matter of this petition was directed to be opened.

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Middletown
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Fugitive-
wanted
on State
Warrant
Number 1

Paragraph 123 of the Police Regulations under which history sheets are started makes provision firstly for history sheets usually called history sheets of class A, pertaining to doctors, burglars, cattle thieves and railway goods wagon thieves and of class B, pertaining to common and professional criminals who commit crimes other than domestic burglary, cattle thefts and thefts from railway goods wagon. Class B history sheets, as the regulation lays down, can be opened in the case of professional thieves and other persons for whom criminal personal files are maintained by the Criminal Investigation Department, persons carrying passengers, railway passenger thieves, bicycle thieves, expert pick-pockets, forgers, coiners, coiners and expert smugglers, fraud rafflers and promoters, telegraph wire cutters and habitual dandriffs. The history sheet which has been started in the instant case is of this class.

The accusations levelled against the petitioner in the anonymous complaint have already been noticed. Briefly they were that he encouraged pick-pocketing and coin-woman taking in the market. There was no charge that he himself was a pick-pocket or belonged to any of the categories of criminals referred to in regulation 123 stated. It simply accused him of helping offenders in pick-pocketing i.e. in carrying out their nefarious activities. What was said against him was that he encouraged pick-pocketing and not that he himself indulged in it or that he was an expert pick-pocket. The other allegation was that he took commissions in the taking of

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commitment in trade transactions if that alone was the measure to assessing him of such a conduct. No offence is thereby committed for the prevention of which action or precaution might be necessary. No question, therefore, of starting a heavy debt, by way of preventive action could at all arise on that account. And if the explanation to the said accusation was that he helped persons in accepting illegal gratifications, again it is not possible to bring him within the description of persons illustrated in regulation 558 and in whose case heavy debts can be started. But even if it be considered for a moment that the prisoner became liable for the commission of an offence by acting in the manner attributed to him, the ultimate sanction will, in my opinion, not represent in view of what appeared from the report itself submitted by Sri Ram Murli Singh. This document does not claim to refer to any instance in which the prisoner was found or suspected to have participated in the commission of pick-pocketing and bribe extortion. Although Sri Ram Murli Singh examined a number of witnesses in the course of the investigation it does not appear from whatever summary of their statements he included in his report that even one witness stated any fact which involved or tended to involve the prisoner in one of accepting or giving of bribe or of encouraging pick-pocketing. Even in the case of the particular instance complained of in the anonymous petition, Sri Ram Murli Singh failed to refer to the particular part played by the prisoner i.e. a part which would induce a reasonable person to suspect, much less hold, that the prisoner was actively connected in the release of the two animals or in persuading Raj Nath to do so, or even that Raj Nath had been paid, as he insisted. The witness that one may take on, on basis is that the prisoner was present at the police station where the bullocks had been carried and ultimately released. It is more surprising that Sri Ram Murli Singh should still report that Mohamad Yous played an important part in the looking up of the matter. The surprise does not end there because he further reported that there was general complaint against him to the effect

that he was in league with pick pocket etc. when none of the witnesses whose testimony of statement he recorded appeared to have made such a claim. One is at pains to find how he reached at this conclusion and why if any general complaint was raised against him, he remained silent about it though it was a very material fact.

In the absence of any general complaint, as does not appear to have been urged by any witness, the only instance which was alleged and in which the personer was or could be said to be involved was the sale of two bullocks by Fakhir. Whether he was actually involved or not or not will not be necessary to decide for the present purpose as shall be presently pointed out. Regulation 128 makes provision for the starting of history sheets in the case of confirmed and professional criminals only. A history sheet can therefore be started only where there is some ground for thinking that the particular person is a confirmed and a professional criminal. Merely because a person is guilty on a certain occasion of some offence or is suspected to be so guilty will not make him confirmed and professional criminal. It is necessary that he should ordinarily be given to the committing of offences. It will be an abuse of regulation 128 to start a history sheet against a person who has on some occasion committed an offence but who is not a confirmed and professional criminal. The permission to start a history sheet arises from the fact that the particular person is considered or thought to be a confirmed or professional criminal for which there should be some basis or material. If in any particular instance there is complete absence of any such material, the action in starting a history sheet will not only be illegal but in my opinion, without jurisdiction too. In the instant case there is indeed, no material even in the report of Mr. Ram Murli Singh, which could warrant the conclusion or even the suspicion that the personer was a habitual criminal. His report, therefore, that he was so was manifestly wrong and erroneous. The action thereon must similarly be held to be arbitrary and capricious.

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Feroze
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Minneapolis
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Petitioner
appears
by F. O. C.
Sullivan,
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Sullivan, J.

The petitioner has stated also why the hearing sheet had been started against him. It is not necessary to record any opinion on this question in view of the fact that upon the report as it is the decision to start hearing sheet was manifestly wrong and capricious.

It was concluded that the opening of a hearing sheet was purely administrative action and it was not open to this Court to interfere with it in these proceedings. Undoubtedly this Court will not interfere in administrative actions but where the action taken is in the face of a statutory or capricious and is without jurisdiction the power of this Court are not wanting.

In the result, therefore, it follows that the hearing sheet opened against the petitioner is illegal. This petition is accordingly allowed and the respondents are directed to cancel the hearing sheet started against the petitioner. The petitioner will get his costs from the respondents.

Petition allowed.

APPELLATE CRIMINAL

Before Mr. Justice Begg and Mr. Justice Mulla*

MUNICIPAL BOARD, LUCKNOW

v.

SHYAM BEHARI

Food Adulteration—Food Inspector and Public Analyst under the previous Act—General Clauses Act, 1897 s. 3(2) scope of—Prevention of Food Adulteration Act 1934 ss. 7 and 18, applicability of—Administrator of Municipal Board, power of

Shyam Behari is the owner of a milk shop and Ram Lal his servant at the milk shop. A food Inspector purchased half a pint of milk from Ram Lal and he put this milk in three bottles which were sealed, sealed and labelled in the presence of his servant. Shyam Behari was present at the time of the sale of milk, but he came down later on and a notice was then given to him. Five sealed sample bottles were sent to the office of the Medical Officer of Health. The Medical Officer of Health sent one sample bottle to the Public Analyst who sent his report showing that the milk contained 18 per cent added water and was adulterated. The Medical Officer of Health on behalf of the Municipal Board Lucknow submitted a complaint against Shyam Behari and Ram Lal. Ram Lal could not be traced. Proceedings started against Shyam Behari.

Held that the person who can be punished for committing the offence is not only the person who handles with the adulterated food but also the person on whose behalf the article sold had a milk and Shyam Behari is liable to be punished under ss. 7 and 18 of the Prevention of Food Adulteration Act.

Held that when fresh appointments are made, appointments made under the previous Act must be considered to be valid and good and the Food Inspector and the Public Analyst must be taken to be persons competent to act in such when the offence took place.

Held also that there was no order by the Administrator which empowers the Medical Officer of Health of the Municipal Board to launch prosecution of the cases and hence the complaint was good in law.

Criminal Appeal no. 321 of 1938 from an order of B. D. Mulla, Chief and Sessions Judge of Lucknow dated the 16th April 1938.

*Imaginary case

1937

November
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Municipal
Board
Lucknow
v.
Shyam
Behari

The facts appear in the judgment:

P. L. And for the appellant

Order: Fraud for the respondent

The judgment of the Court was delivered by—

BEN, J.—This is an appeal by the Municipal Board, Lucknow. It is directed against an order of acquittal of one Shyam Behari passed by Mr B. B. Mulla, Civil and Sessions Judge, Lucknow.

The respondent Shyam Behari was prosecuted for an offence under section 3, read with section 39 of the Prevention of Food Adulteration Act 1934 (Act 37 of 1934). He was acquitted by the trial court and sentenced to pay a fine of Rs. 600 or, in the alternative, to undergo four months simple imprisonment. On appeal he was acquitted by the learned Civil and Sessions Judge, Lucknow. Dissatisfied with the said judgment the appeal has been filed by the Municipal Board, Lucknow against the said order of acquittal.

Shyam Behari is admittedly the owner and proprietor of a small shop known as Geyraat Road, Lucknow. One Ram Lal used to work as his servant at this shop. On the 15th of September 1956 Sri G. P. Mishra, Food Inspector paid a visit to this shop in the morning at about 8.30 a.m. He purchased half a sack of milk from Ram Lal and paid about 4 as as price. He took the milk in three bottles. These bottles were duly packed, sealed, sealed and labelled in the presence of the witnesses, Sri K. N. Agarwal, Ramhari Prasad and Bhagwan Das, who were present at the shop from the beginning. In the meantime Shyam Behari who was upstairs came down. On his appearance Sri Mishra handed over a notice to him. This notice is Ex. P (1). Shyam Behari signed this notice. The original of the notice was also signed by the witnesses. Two sealed sample bottles were sent to the office of the Medical Officer of Health. The Public Analyst, The Public Analyst sent his report, Ex. P (2). This report showed

that the sample of milk sent to him contained 19 per cent added water and was adulterated. Thereafter, a complaint was submitted against Shyam Behari by the Medical Officer of Health on behalf of the Municipal Board Lucknow. The complaint was against Shyam Behari as well as Ram Lal his servant. Ram Lal, however, could not be traced. Shyam Behari was the only person against whom the prosecution proceeded.

The sequel of the respondents in the present case was made by the lower appellate court on two grounds. The first ground was that no examination of the respondent was made under section 342 of the Code of Criminal Procedure. On this point the lower appellate court appears to have ignored the fact that there is on record an examination of Shyam Behari under section 342 of the Code of Criminal Procedure. He was put detailed questions on matters appearing in evidence against him. He admitted that the shop of milk belonged to him. He further admitted that Ram Lal was his servant. He also admitted in his statement that the entry Ex. P (1) bore his signature. He also admitted that the sample of milk was taken from a bucket of his shop. He denied the fact that the milk was adulterated. Under the above circumstances we are of opinion that the appellate order cannot be sustained on the ground that no examination of the accused under section 342 of the Code of Criminal Procedure was done.

The second ground for quashing the respondents was that the persons who had committed the offence was his servant Ram Lal and Shyam Behari, being the proprietors, could not have been convicted. This ground taken by the learned lower appellate court also appears to be directly inapplicable. Section 7 of the Prevention of Food Adulteration Act, 1934, (Act 27 of 1934), lays down as follows:

No person shall himself or by any person on his behalf manufacture for sale, or store, sell or distribute

(b) any adulterated food

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 Muzumdar,
 Bhabu
 Lalwari
 +
 Ram
 Mohan
 Das
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unable to accept that construction, as it ignores the provisions of section 6 of the General Clauses Act, 1897. Section 4 of the General Clauses Act, 1897, lays down this:

where	any General Act
repeals any enactment,	then unless a
different intention appears, the	repeal shall not

1897
 Interpretation
 (General Clauses Act)
 Section 4
 Repeal
 Section 2

(b) affect the previous operation of any enactment so repealed or anything duly done or suffered thereunder.

There can be no manner of doubt that the Food Inspector who acted in the present case was appointed under the previous Act, and his appointment was an act duly done under the said Act. After the coming into force of the new Act, it would naturally take time before fresh Food Inspectors could be appointed. Until fresh appointments are made, appointments duly made under the previous Act must be considered to be valid and good. In this view of the matter we are of opinion that the Food Inspector who took the sample of the adulterated milk must be taken to be a person competent to act in such when the offence took place.

Learned counsel for the respondent further advanced a similar argument about the incompetency of the Public Analyst to conduct any analysis under the new Act. This argument can be answered effectively in a similar manner to the argument relating to Food Inspectors.

In the end, the learned counsel for the respondent argued that no proper complaint was lodged in the present case. In this connection, he invited our attention to section 20 of the Prevention of Food Adulteration Act, 1934. Section 20 runs as follows:

(1) No prosecution for an offence under this Act shall be instituted except by or with the written consent of the State Government or a local authority or a person authorised in this behalf by the State Government or a local authority.

Having heard the learned counsel for the respondent, we are of opinion that this point also has no substance. In

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the present case the complaint was lodged by the local authority namely, the Municipal Board. This complaint has been signed by the Municipal Medical Officer of Health. Learned counsel for the respondent argued that the Medical Officer of Health (Municipal) Board, was not authorized to launch complaints on behalf of the Board. In reply the learned counsel appearing for the Municipal Board issued an affidavit in an order by the Administrator which empowers the Medical Officer of Health (Municipal) Board, to launch prosecutions of this nature. It may be mentioned that this point was not taken by the respondent at the stage of the trial stage, otherwise the relevant order might have been brought on record. As this point was taken for the first time at this stage we are taking notice of this fact. For the above reasons it cannot be said that the complaint in the present case was not made by the authority competent to prosecute.

No other point was urged before us.

The net result of the findings given by us above is that the acquittal of Byram Bahari must be set aside. We may mention that there is ample evidence on record to support the conviction of the respondent on counts No. 1 & 2. Mohan, (P W 1), Food Inspector, has proved the fact that he purchased the milk from the shop of the respondent and he took the sample. His statement is corroborated by R. S. Gupta, (P W 2), and the report of the Public Analyst that the milk was adulterated. Two defence witnesses were produced on behalf of the respondent. Their evidence has rightly been rejected by the trial court. We are of opinion that they are unreliable witnesses.

We accordingly allow this appeal and set aside the acquittal of the respondent. We restore the order of the trial court and, finding the respondent guilty of having committed an offence under section 274 of the Prevention of Food Adulteration Act, 1954, sentence him to a fine of Rs 500 or, in the alternative, to undergo simple imprisonment for a period of four months.

Appeal allowed

CRIMINAL REVISION

Before Mr. Justice Ag and Mr. Justice P. D. Shergona

SHRI PRASAD

v

STATE

1938

Order 1

Fals information to a public officer—Prosecution for—Arrest completed to file the complaint—Objection to prosecution when to be taken—Indian Penal Code 1860 s 183—Code of Criminal Procedure, 1896 ss 194 and 197

Where a false complaint made to a public officer is referred to and required to be by a subordinate officer before whom the said complaint is reported, the latter is a competent authority, within the requirements of s 183 of the Code of Criminal Procedure to initiate the prosecution for the offence under s 182 of the Penal Code.

Moreover the objection to the validity of a prosecution for want of the required complaint must be raised at the earliest possible opportunity so that the material facts may be brought on record and an failure to do so the order or sentence may well stand within the saving granted by s 187 of the Code of Criminal Procedure.

Mahar v. King Emperor (1) distinguished. *Observations of Atkinson J. in King Emperor v. Lachman Singh* (2) approved.

Criminal Revision no. 778 of 1938 from an order of B. N. Nagari Sessions Judge, Agra (as he then was), dated the 10th May 1938.

The facts appear in the judgment.

B. S. Barham for the appellants.

The Government Advocate, Mr. H. Faruqi, for the State.

The judgment of the Court was delivered by—

V. D. BHARGAVA. J.—This is an application in revision which has come to this Court on being referred to a Bench by a learned Single Judge as there was an important question of law involved in the case.

The appellants had applied for a licence for a gun to the District Magistrate of Agra. Their application was

Minister and it was the Chief Minister who could file the complaint and not Mr. Yashwantrao or it should have been any officer superior to the Chief Minister who could have filed the complaint. Learned counsel has relied on the decisions in *Easton v. Easton* (1) *U. Singh v. R. P. Singh* (2) and *Sultan v. C. de St. Hilaire* (3). In those cases the statements had been made to police officers. Later on, a complaint was filed by the Sub-Divisional Magistrate before whom the statements had been filed. Therefore, the facts of this case are different from the facts of the other two cases which have been cited by learned counsel. In this case the information had been given initially to the Chief Minister by the applicants. When enquiry was being made by Mr. Yashwantrao, the information was again given to him with regard to the demanding of Rs. 200 by the Tehsildar and the Range and about his name. Therefore, it cannot be said that in the present case the information had not been given to Mr. Yashwantrao on the basis of which he could file the complaint and he would, under section 156 Indian Penal Code be the public servant concerned.

Reference was also placed by learned counsel for the applicant on a Bench case of this Court in *Altaf v. King Emperor* (4) where the accused had applied for transfer of his case from Tehsildar's court and the applicant made certain unfounded allegations against the Tehsildar. He was examined by the Sub-Divisional Magistrate and he repeated the allegations made in his application. The Bench held that—

the statement made under such circumstances was not information given to a public officer within the meaning of section 156 Indian Penal Code and the petitioner could not be prosecuted for that statement inasmuch as he was in the position of an accused person and made the statement in answer to questions put by the Sub-Divisional Officer.

The facts of that case and the present case are different. In the present case the statement was made

(1) A.I.R. 1952 Pat. 44. (2) A.I.R. 1952 Nag. 107.
(3) A.I.R. 1952 Nag. 104. (4) (1952) 1 A.L.J. 101.

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was by the accused person in a transfer application before the Sub-Divisional Magistrate. So far as the making of the statement by the accused is concerned, he would be protected under section 342 Criminal Procedure Code. When the Sub-Divisional Magistrate had examined him in the reported case, he was being examined as an accused person and, therefore, whatever statement he made whether true or false, he would not be made liable for that. No proceedings could be taken against him on that ground. In the present case when the Sub-Divisional Magistrate had examined the applicant, he was not in the capacity of an accused person and, therefore, the facts of the reported case being different in our opinion, they do not apply to the facts of the present case.

It was further contended that when the statement was made before Mr. Tandon, it was not made voluntarily by the accused. It was because he was asked questions which he was bound to answer. He was bound if at all to answer those questions truthfully and correctly. Otherwise, it was open to him not to answer the questions if he so liked. But if he falsely stated before him that the Tehsildar and the Zamindar had demanded a bribe of Rs.500 and also had given a false statement about his status, then, certainly, he was giving a false information to Mr. Tandon and proceedings could be taken against the accused whether the statements had been made voluntarily or upon questions put to him. This view is supported by a decision of the Patna High Court in *King Emperor v. Lakhman Singh* (1). The matter was referred to a third Judge on a difference of opinion between two Judges of the Court namely, *ANAND, J.* and *WARR, J.* *ALLAHABAD*. The third Judge held that the statement contemplated by clause (c) of section 182, Indian Penal Code does not depend upon what is done or omitted to be done by the public servant on a false information given to him, but upon what was the intention in the making of the information. The information was referred to in section 182, Indian Penal Code may be either an information which is volunteered as information given in answer to a question. We respectfully

agree with the observations of ALLANSON, [1], in the above case.

Apart from this fact, this objection had not been taken by the applicant in the court of the trial Magistrate. Under the amended Code of Criminal Procedure in view of the Explanation added to section 187 of the Code, that Court has to take into consideration whether any error, omission or irregularity in any proceeding under that Code has occasioned a failure of justice. The court has also to have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings. In case the objection could or should have been taken at an earlier stage and was not taken the Court is reluctant to interfere in its revision jurisdiction. This plea could have earlier been taken in the Magistrate's court. Then a map have been for the prosecution to produce any letter or correspondence which may have passed between the Chief Minister and the District Magistrate and it may be that this action was taken at the instance of the Chief Minister. On the file there is a letter received from the Government by the District Magistrate to the effect that the allegations made by the petitioner against the Tehsildar were serious and the District Magistrate was directed to examine the desirability of taking action against the petitioner for making false complaint and giving wrong declaration about his status. The District Magistrate, Agra, was further informed that the Government desired that such persons who try to seek their ends by such means should be dealt with severely. Thereafter the District Magistrate sent the whole file to the Government for sanction and there might have been actually directions by the Chief Minister to file the complaint, but since the file is not complete, we are not at a position to say whether actually permission had been obtained or not. In any event, as we are not satisfied on merits, we do not think that the sanction can be set aside.

Lastly it was argued on behalf of the applicants that after a lapse of about four years it will not be proper to send the applicants to jail for a short period and that

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period of the sentence of imprisonment a sentence of fine may be imposed upon the applicant. We think this request is a reasonable one.

We, accordingly, while maintaining the conviction of the applicant, set aside the sentence of imprisonment and in lieu thereof we impose a sentence of fine of Rs 500. In default of payment of fine the applicant will undergo rigorous imprisonment for three months. With this modification the sentence is decreed. The applicant is an ind. He need not surrender so long as he provided he pays the fine within a period of two months.

Revenue allowed with modification

CRIMINAL REVISION

Before Mr. Justice Oak and Mr. Justice B. Deyal

1955
 December
 1955

K. C. GUPTA

II
 STATE

Content: Trial—Production of documents in—order for, against the accused—Police act—Code of Criminal Procedure, 1909 s. 54—Constitution of India 1950 Art. 32 (3).

An order passed under s. 54 of the Code of Criminal Procedure calling upon the accused to produce a document in his possession and liable to be used against him within the prescribed time had been made under Art. 32(3) of the Constitution—Mistaken conclusion—and it therefore had and liable to be set aside.

M. P. Sharma v. Bank of India (2) applied. *Abdul Subhan v. State (2)* followed.

Criminal Revision No. 681 of 1955, from an order of K. C. Mukherjee Additional District Magistrate, Aggra dated the 11st May 1955.

The facts appear in the judgment.

K. C. Upadhyaya for the applicant.

Mohammed Fayaz Siddiqui for the opposite party.

(1) A. I. R. 1955, C. 280
 1955, Decided on the 10th October 1955.

(2) Criminal Revision No. 195 of

The judgment of the Court was delivered by—

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Ques. J. —The question raised in this criminal revision is whether an order passed by a court under section 94 of the Code of Criminal Procedure amounts to the prohibition contained in Article 20(3) of the Constitution of India. The question arises under the following circumstances:

R. C. GUPTA
Vs. St. A.

Mohan Lal Sharma filed a complaint against R. C. Gupta under sections 406, 417, 480 and 501 Indian Penal Code. The case was in the stage of an enquiry under section 502 Criminal Procedure Code. The complainant applied to the trial court for an order to the police for recovery of certain documents from the possession of the accused under section 98, Criminal Procedure Code. Accordingly the trial court issued a search warrant under section 99 Criminal Procedure Code to the Station Officer Kanouli Agra. The case was on the file of the Hon'ble Commissioner Bench Magistrate Agra. Subsequently, the trial court issued a summons to the accused, calling upon him to appear either himself or produce some of his subordinates and to produce certain documents in the court. An objection was filed on behalf of the accused. The issue posed itself in the objection was that under Article 20(3) of the Constitution the accused could not be compelled to produce evidence against himself. The objection was overruled. On February 19, 1957, the trial court passed the following order: Arguments heard. The applicant shall produce documents required to be produced.

R. C. Gupta accused filed a revision application against the trial court's order, dated February 19, 1957. That criminal revision was dismissed by the learned Additional District Magistrate of Agra, by his order, dated May 21, 1957. He held that there was no violation of Article 20(3) of the Constitution. R. C. Gupta filed the present criminal revision against the Additional District Magistrate's order, dated May 21, 1957. When the criminal revision came up before a learned Judge of this Court, he thought that the case should be

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heard by a Bench of two Judges, in view of the importance of the question at issue involved in the case. That is how the criminal process has come up before us.

Section 94, Criminal Procedure Code enables a court to issue a summons to produce a document or any other thing. Section 95 of the Code empowers the court to issue a search warrant. These are different provisions for production of documents before the court. Clause (3) of Article 20 of the Constitution goes thus:

No person accused of any offence shall be compelled to be a witness against himself. The question to be considered in the present case is whether Article 20(3) of the Constitution is contravened when a summons is produced a document is issued against a person, who is an accused in a case.

A somewhat similar question came up for consideration before their Lordships of the Supreme Court in *M. P. Sharma v. Satish Chandra*(1). In that case the question considered by the Supreme Court was the validity of a search warrant issued under section 94, Criminal Procedure Code. Their Lordships however had occasion to discuss orders under section 94, Criminal Procedure Code also. In paragraph 13 of the judgment in *M. P. Sharma* case (1) their Lordships observed that

Broadly stated the guarantee in Article 20(3) is against "testimonial compulsion". It is suggested that this is confined to the oral evidence of a person standing his trial for an offence which called for the witness stand. We can see no reason to conflict the content of the constitutional guarantee so that hardly lateral import.

A person can be a witness not merely by giving oral evidence, but also by producing documents or making intelligible gestures as in the case of a dumb witness or the like.

To be a witness is nothing more than to furnish evidence, and such evidence can be furnished through the lips or by production of a thing or of a document or in other modes.

It follows that the provision afforded to an accused in so far as

it is related to the phrase "to be a witness" is not merely in respect of testimonial compulsion in the court room but may well extend to compelled testimony previously obtained by him.

Again, their Lordships observed in paragraph 18 that notice to produce is addressed to the party concerned and his production in compliance therewith constitutes a testimonial act by him within the meaning of Article 20 (3) as above explained. These observations make it clear that the expression "to be a witness" used in Article 20 (3) of the Constitution has to be read in a wide sense. That expression includes furnishing evidence.

The learned Assistant Government Advocate relied upon the following sentence appearing in paragraph 17 of that judgment: "Notwithstanding these assumptions we are unable to read sections 94 and 94 (1), Criminal Procedure Code, as importing any statutory recognition of a theory that search and seizure of documents is compelled production thereof. In that passage their Lordships were mainly pointing out that search and seizure of documents could not be treated as compelled production. It is to be remembered that *M. P. Sharma* case (1) was under section 94, Criminal Procedure Code. In the present case we are concerned with an order issued under section 94, Criminal Procedure Code. An order under section 94, Criminal Procedure Code, is directed to a person to produce documents before the court. Such an order is clearly an order to furnish evidence. Such an order, therefore, attracts the prohibition contained in clause (3) of Article 20 of the Constitution."

The same view was taken by a Division Bench of the Court in *Atul Sahas v. State* (2). Two questions were referred by a learned Judge. The questions were raised by the Division Bench. Question no. 1 as reformulated follows: "If by an order of the Court the accused person produces a document, which contains evidence against him, does the production of the document amount to testimonial compulsion within the meaning of Article 20 (3) of the Constitution?" The

(1) A.I.R. 1954 (1) 129.

(2) 65, Bombay L.R. 333 of 1955. Decided on 24th October, 1954.

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Dewan Bhatia answered this question in the affirmative. We respectfully agree with that view.

It follows that in the present case the trial court was wrong in compelling the accused to produce documents, which were likely to be used as evidence against him. Since the impugned order contravenes Article 20 (3) of the Constitution that order must be set aside.

The Criminal Revision is allowed. We set aside the trial court's order, dated February 19 1953, directing the accused to produce documents before the court.

Revision allowed.

APPELLATE CRIMINAL.

Before Mr. Justice Mathew.

DEV LAL AND OTHERS

v

STATE.

1954
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Provision in preliminary inquiry—Power of Presiding Judge to direct it to continue in the night—When and how to be exercised—Code of Criminal Procedure, 1950 ss. 133 and 140.

The power of the Sessions Judge to treat the evidence before the Commissioning Magistrate as evidence in the trial before him must be exercised judicially on sufficient grounds and through a specific decision in that effect.

Where the prosecution witnesses are alleged to have been tampered with and excluded from their evidence at the preliminary inquiry it is the duty of the Judge to test by cross-examination or other evidence under s. 140 of the Code of Criminal Procedure and satisfy himself of the truth of the allegations made. The mere fact that the Sessions Judge chose to treat it as such will not render the evidence admissible through s. 133 of the Code and the objection based on such an evidence must be set aside.

Criminal Appeal No. 1768 of 1953, from an order of D. D. Apperal, Assistant Sessions Judge of Mirzapur, dated the 22nd November, 1953.

The facts appear in the judgment.

Mixed Verdict for the appellants

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 Div. Ld.
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Noida

MURRAY, J. —This is an appeal by Dew Lal and nine others against their conviction of the offences punishable under sections 393 and 412, Indian Penal Code and the sentence of seven years' rigorous imprisonment on each count, the two sentences to run concurrently, in connection with the dacoity committed in the house of Jayhan in village Pandu, police station Kharsa of district Meerut, on 1st October, 1935, at 10 p.m.

Jayhan lodged the report of dacoity at the police station the next day at 12.30 p.m. and therein no one was named or suspected to have committed the dacoity. However, as a result of the test identification parties the present appellants were challenged and have been convicted of the offence of dacoity, and also for being in possession of stolen properties, the possession of which was transferred to the present dacoity. The prosecution witnesses including the complainant and his relatives supported the prosecution case in the committing court. They then pointed out the appellants and also identified the stolen properties and to have been recovered from the possession of the appellants, at the same time deposing that they did not know the appellants from before the dacoity was there for the first time in the dacoity and then at the time of the identification proceeding and not at between. A similar statement was made about the stolen properties, the complainant and his relatives claimed to be the owners of the properties and also asserted that they had been taken away by the dacoits. But during the trial all the eye witnesses except the one recited from their earlier statements. The learned Sessions Judge admitted their evidence under section 283, Criminal Procedure Code, and on its basis convicted the appellants.

In exceptional circumstances, conviction may be based purely upon the evidence of witnesses admitted under section 283, Criminal Procedure Code. Such instances could be few only when it is established that all the witnesses had been won over and the statements made by them in the committing court were true while

that made during the trial were false. Further, in cases where the prosecution solely relies upon the testimony of witnesses made in the examining court, it has to be careful in the conduct of the case. It is necessary for the prosecution to properly cross-examine the witnesses and to lead additional evidence if necessary, to prove that the statements made by the witnesses during the trial are false. Such evidence can, in the discretion of the Sessions Judge, be adduced under section 140, Criminal Procedure Code, on points which would show that the prosecution witnesses were intentionally making a perjured statement in the court.

The State counsel did not question the diligence that the prosecution shall have to take in securing the conviction of the appellants on such evidence. I would say that the State counsel acted negligently and did not properly cross-examine the witnesses. For example, Jagan deposed that Ilee Lal accused was the son of his father's sister, that Moharman accused was also his father's son, that Ilee Lal was born in his village (Pandi) and lived in the village before shifting to village Papri and that Ilee Lal accused was married to the daughter of Bappa Akar of village Pandri. The prosecution should have led evidence in cross-examining the complainant to disprove the alleged relationship. But it is of significance that not a single question was put to the complainant on the alleged relationship. In case such relationship did exist, the State counsel would, of course, not immediately cross-examine the complainant to disprove facts which he has stated. But if this part of the statement was not true, it was necessary for the State counsel to discredit the complainant by his own cross-examination and by bringing on record sufficient material to prove that no such relationship existed.

Jagan also deposed that Bholu accused had his relationship in the house of Ram Bhoos of village Pandri, that Bholu was the grandson of village Gaps, Bappa and others, which are near village Pandri, that the house of the maternal uncle of Chhara accused was in the house of Ram Jagan of village Pandri, that Jagan

Lai (Shanker Lal), Babu, Lai Pura and Bhagwat used to play chess in marriages and when came in marriages in village Pandri and in the neighbouring villages and that these accused prepared books and sold them in village Pandri. In case the statement of Jagan with regard to the relationship of Dev Lai, Mohanram and Babu is correct, his statement with regard to other accused persons can also be accepted. In other words, the eye witnesses were acquainted with the appellants from before the dacoity. If the prosecution can make out a false case with regard to the identification of these appellants, there would be no difficulty in creating evidence with regard to the recovery of the alleged stolen properties.

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 J. Ali
 Mathur J.

The learned Assistant Sessions Judge, I must say, had not properly controlled the proceeding, nor did he take any interest in the conduct of the case. He should have realized the difficulties to be faced in a case of the present nature and should have either himself cross-examined the eye witnesses or suggested to the State counsel to cross-examine them if the statements of the witnesses were incorrect. He would then have known whether the statements made by the witnesses during the trial were true or false, and thus would have enabled him to come to a decision whether to act upon the depositions of the witnesses made in the committing court. The learned Sessions Judge did not pass any order in relation to the accused persons that the depositions of the witnesses made in the committing court would be used against them. There is no order on the record to suggest that the depositions were being admitted under section 261 Criminal Procedure Code, nor was it indicated to the accused persons during the examinations that such statements would be used against them. The accused were not confronted with these statements with the result that there would have been considerably handicapped in their defence in not being able to notify the court that the depositions made in the committing court were incorrect and could not rightly be admitted under section 268, Criminal Procedure Code.

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In this connection it may be observed that the learned Sessions Judge has not indicated the grounds why he was relying upon the depositions made in the committing court. His opinion is he under the impression that if the witnesses make one statement in the committing court and another thereafter during the trial and there is discrepancy from the side of the prosecution that the witness had been told over, the court can automatically accept the statements made in the committing court.

There are also certain mis statement of facts in the judgment. Justice merely stated that Baithe Alam had warned him to tell the truth. The learned Sessions Judge wrongly formed an opinion that the complainant was so warned to deny all the facts and to allege that the Sub-Inspector had threatened him.

The statements of the witnesses made in the committing court cannot, for reasons indicated above, be used as corroborative evidence under section 336, Criminal Procedure Code. There is also no material on the record to prove that the statements made by the witnesses during the trial were accurate. On the other hand, the only inference which can be drawn from the evidence on the record is that two of the appellants are related to the complainant and the others have relations in the village, or used to visit the village from before the dacoity. In such circumstances the result of the identification cannot be used against them. When the case does not appear to have been prosecuted in good faith, no reliance can be placed upon the alleged recovery of stolen properties. It may also be observed that when the accused were being committed for the offence of dacoity it was not necessary to commit them of the other charge under section 412, Indian Penal Code.

The result is that the appeal succeeds and is hereby allowed. All the appellants are acquitted of the charge under sections 399 and 412, Indian Penal Code. The Court is relieved that only Baithe could avail of the order of this Court granting bail to the appellants. His

and bond shall stand discharged and the other appellants shall be released immediately unless wanted in connection with some other crime.

Appeal allowed

1939
<hr/> Dist. Lab.
<hr/> + Suzam
<hr/> Mother v

CIVIL MISCELLANEOUS

Before Mr. Justice James

1939
<hr/> Apparaj
<hr/> vs

MAHARAJ PARSHOTTAM DAS CHUNNI LAL

(APPLICANT)

v

BRIJ MOHAN LAL AND OTHERS

(OPPOSITE PARTIES)

Industrial Disputes—Disputation of—Delegation of power by State Government to Labour Commissioner and Deputy Labour Commissioner—Scope and validity of—United Provinces Industrial Disputes Act, (XXVIII of 1947) in 26 and 11 A—Motion—Filed 20th May 1950—Continuation of Order 1899 of 1948

Section 14 of the United Provinces Industrial Disputes Act empowers the State Government the duty to judge whether an industrial dispute exists or is apprehended and empowers it with the power to refer the same for decision to a labour court or Tribunal as the case may be and the delegation conferred by s. 11 A is confined to the power and does not extend to the former which must be discharged by the State Government alone.

Accordingly while the Deputy Labour Commissioner purporting to act through the delegates made under s. 11 A, holds his own opinion regarding the existence of an industrial dispute and refers the same for decision to the Industrial Tribunal the reference is made is not competent and must be quashed.

Maheer Baidhark Pathak v. State of Uttar Pradesh (1) disapproved from *Pooja Lal Sharma v. Emperor (2)* explained.

(1) 1951 A. L. J. 365

(2) A. L. J. 1948 AC 142.

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Civil Miscellaneous Writ No. 1266 of 1958

The facts appear in the judgment.

Jagdish Saurabh and T. N. Sarda for the applicants.

The Standing Counsel (N. D. Puri) and S. B. Parmar for the opposite parties.

JUDGES. J.—This petition under Article 226 of the Constitution raises an important question of delegated legislation under the U. P. Industrial Disputes Act (U. P. Act no. 28 of 1947). In order to properly appreciate the issue at stake, it would be necessary to have an understanding of the provisions of the Act viz. sections 4 E and 11 A and a notification by the State Government published in the U. P. Gazette. Sections 4 E and 11 A run as follows:

Section 4 E.—Where the State Government is of opinion that any industrial dispute exists or is apprehended, it may, at any time by order in writing refer the dispute or any matter appearing to be connected with or relevant to the dispute, to a Labour Court if the matter of industrial dispute is one of those contained in the First Schedule or to a Tribunal if the matter of dispute is one contained in the First Schedule or Second Schedule for adjudication.

Section 11 A.—“The State Government may, by notification in the official Gazette, direct that any power exercisable by it under this Act or rules thereunder shall, in relation to such matters and subject to such conditions, if any, as may be specified in the direction, be exercisable also by such officers or authority subordinate to the State Government as may be specified in the notification.”

The notification in question is dated the 29th May 1957 and is in these words:

In exercise of the powers conferred by section 11 A of the U. P. Industrial Disputes Act 1947 (U. P. Act no. 28 of 1947), the Government of Uttar Pradesh is pleased to direct that the powers exercisable by the State Government under the following

sections of the said Act shall be enforceable also by the officers mentioned against each

Section	Officer	<div>1947</div> <div>Industrial Disputes Act</div> <div>1947</div> <div>Section 17</div>
4 K.	1 The Labour Commissioner, Uttar Pradesh. 2 The Deputy Labour Com- missioner	
4 K.	The Labour Commissioner Uttar Pradesh	

Now, the petitioner, Messrs. Purnoharan Das Chandra Lal Industries Oil and Dal Mill Hathras, is a firm which runs an oil and dal mill at Hathras and employs a number of workmen. A dispute in respect of bonus for the year 1955-56 arose between it and its workmen. Conciliation proceedings have proved fruitless, the Conciliation Board referred the relevant papers to the Deputy Labour Commissioner who after examining them passed the following written order of reference, dated the 28th November 1957:

Whereas I am of opinion that an industrial dispute in respect of the matter hereinafter specified exists between the employer and the workmen of the concern known as Messrs. Purnoharan Das Chandra Lal Industries Oil and Dal Mill Hathras district Aligarh.

Now therefore in exercise of the power conferred by section 4 K of the U P Industries Disputes Act 1947 (U P Act no XXVIII A-1947) 1947 dated May 20 1957 I hereby refer the said dispute to the Industrial Tribunal (General) at Allahabad constituted by G O no U 179 (ST) 44 (XXXVI)-A dated April 28, 1957 for adjudication on the following issue:

Matter of Bonus

Should the employer be required to pay bonus to their workmen for the year 1955-56? If so at what rate and with what details?

after the words "power exercisable by it," and it cannot be supposed that what the statute does not expressly or impliedly authorise it to be taken to be prohibited. It necessarily follows that the Deputy Labour Commissioner had no jurisdiction to form the opinion that an industrial dispute existed between the petitioner firm and its workmen. According to my reading of section 11 A, the State Government alone was entitled to form such an opinion, and further, that only after it had done so, did the Deputy Labour Commissioner become invested with the right to exercise the delegated powers of referring the dispute to the Tribunal.

Let it be thought that I am making an artificial or arbitrary distinction between a duty and a power. I should like to give two simple illustrations which might help to emphasise the validity of the distinction. An employer or umpire has the duty to count number of balls in an over, but a power to declare one or more of them no-balls. A trial Judge has the duty to record the statements of a witness, but the power to disallow an irrelevant question. It would be stretching the legal meaning of the word power too much to say that the employer or umpire has the power to count the number of balls in an over, or the trial Judge the power to record a witness's statement, indeed, in jurisprudence a power and a duty are correlative terms and certainly not identical. Further, the distinction which I am drawing is one which the legislature itself acknowledges. Two instances should suffice to illustrate this. The first is drawn from the Defence of India Act, 1938, section 2 (7) of which conferred certain powers and imposed certain duties on the Central Government. Sub-section (4) of section 2 of the Act runs:

The Central Government may by order direct that any power or duty which by rule under sub-section (3) is conferred or imposed upon the Central Government shall, in such circumstances and under such conditions, if any, as may be specified in the direction, be exercised or discharged—

(a) by any officer or authority subordinate to the Central Government, or

1938
 Article
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 from
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1887
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(3) whether or not the power or duty refers to a matter with respect to which a Provincial Legislature has power to make laws by any Provincial Government, or by any officer or authority subordinate to such Government.

My second illustration is taken from the U P Maintenance of Public Order (Tanganyika) Act, 1947, an Act of the legislature of our own State. Sections 3(1) and 11 of it provided

Section. 3(1).— The Provincial Government, if satisfied with respect to any person that with a view to preventing him from acting in any manner prejudicial to the public safety, or the maintenance of public order or communal harmony it is necessary so to do may make an order (a) directing that he be detained

Section. 11.— The Provincial Government may, by order direct that any power or duty, which is conferred or imposed on the Provincial Government under this Act, be exercised or discharged by any officer or authority

Both Acts conferred a power and imposed a duty on the Government, and both authorized the latter to delegate to subordinate authority both the power and the duty. See *Asquith v. R. C.* in the standard work *Legislation Drafting and Forms* (11th Edition) at page 159 declares to the same effect. There is thus high authority for the view that where an enactment imposes a duty and confers a power on the Government, the latter can delegate to a subordinate authority only those of its functions which the enactment permits it to do, so that where it is authorized to delegate its power, but not its duty, or vice versa, and does delegate it, the delegatee has jurisdiction only to exercise the power, but not the duty, or vice versa, but not both. For my part, it is scarcely necessary to emphasize that a statutory provision dealing with delegation must be strictly construed.

Hence, in my view, so long as section 11 A stands in its present form that is to say authorizes the State

Government is delegator only its power under section 4-K. I do not see any escape from the conclusion that the Labour Commissioner or his Deputy has no jurisdiction under section 4-K to perform the duty of forming the opinion that an industrial dispute exists or is apprehended which can be done by the State Government alone. It is only after the State Government has performed this duty that the Labour Commissioner or the Deputy Labour Commissioner become entitled to exercise his delegated power under section 11-A, read with the notification of the 13th May, 1937, and proceed to refer the dispute to a Labour Court or Tribunal for adjudication.

1938
Labour
Commissioner
has
jurisdiction
under
section 4-K
1938
Labour
Commissioner
has
jurisdiction
under
section 4-K

In arguing the contrary the learned counsel for the State and the respondents' gentlemen have relied strongly on the contra decisions of those Single Judges of this Court viz. of Hon'ble TAYLOR, J. in *Mahar Sahibzad Industries v. State of U. P.* (1) of Hon'ble BHAGWAN, J. in *Mahar Upper Doon Sugar Mills Ltd. v. The Labour Commissioner* (2) and of Hon'ble B. BHAGAT, J. in *Dr. Tara Chand v. The Rent Control and Rationing Officer, Jammu* (3). I have examined the judgments of these Hon'ble Judges with the care and attention that they deserve but it is with the profoundest respect to them that I feel constrained to differ from them. For it seems to me that the distinction between the State Government's duties and powers embodied in section 4-K was not brought to their notice adequately nor does it appear to have been argued before them that in forming his opinion about the existence of an industrial dispute the Labour Commissioner was exercising a function which under the Act could not be delegated to him.

Learned counsel for the respondents have also relied on the judgments of Hon'ble WAGHMODE, J. in *Pooja Lal Sharma v. Emperor* (4). That decision was given in a case under the U. P. Maximisation of Paddy Order (Temporary) Act of 1947. The relevant provisions of which I have already quoted. The judgment deals

(1) 1934 A. L. J. 582

(2) Civil Miscellaneous No. 23
of 1938 decided on 15th
December 1938

(3) Civil Miscellaneous No. 10
of 1938 decided on 16th September
1938

(4) A. I. R. 1948 (2) 142

1957
Raja Syed
Mohammed
Saadat
Ah Khan
vs. Board
of Urban
Revenue,
Muzaffargarh

In order to be able to answer the question it is necessary to state just a few facts.

The assessee was Raja Syed Mohammed Saadat Ah Khan of Muzaffargarh, which was an estate in the district of Bahawalpur. The assessee was assessed to agricultural income tax for the years 1955 and 1956 Fash. For the first year he was assessed to pay a tax of Rs 2,84,457 while for the latter year he was assessed to pay a tax in the sum of Rs 1,51,509-8. The assessee appealed against the order of the taxing authority and the Commissioner on appeal enhanced the tax so that the assessee was called upon to pay Rs 5,64,743-18 for the year 1955 Fash. and Rs 4,14,213 for 1956 Fash.

Before the Board the assessee raised several contentions which were upheld by the Board. One of the contentions which was raised before the Board and in respect of which the Board has made this reference was as to the true interpretation of clause (j) in Part I of the Schedule. Clause (j) says that the agricultural income tax payable shall in no case exceed half the amount by which the total agricultural income exceeds Rs 3,000. The contention of the assessee is that the word "income" in this clause included super tax as well, even though the super tax was calculated according to different rates as provided for in Part II of the Schedule.

The Schedule according to which the tax has to be determined has been put into two distinct parts. Part I deals with agricultural income tax, that is to say the rates applicable for determining the agricultural income tax, while Part II deals with the rates according to which agricultural super tax is to be determined. Under Part I there are three clauses.

Clause (a) is in these words:

no agricultural income tax shall be payable on a total agricultural income which does not exceed Rs 1,000.

Clause (b) is in these words:

the agricultural income tax payable shall in no case exceed half the amount by which the total agricultural income exceeds Rs 3,000.

Under Part II there are no such limiting clauses.

The main question that therefore falls for our determination is whether agricultural income tax and agricultural super tax are the same entity or, in put it differently, whether agricultural super tax can be deemed to be included in the term agricultural income tax. In our opinion the language of section 3 and its provisions supply a key to the answer which we have to give to the problem stated above. Section 3 is in these words:

(1) Agricultural income tax and super tax at the rate or rates specified in the schedule shall be charged for each year in accordance with and subject to the provisions of this Act and rules framed under clauses (a), (b) and (c) of sub-section (2) of section 84 on the total agricultural income of the previous year of every person.

(2) Where there is included in the total agricultural income of an assessee any income exempted from agricultural income tax by or under the provisions of this Act the agricultural income tax payable by the assessee shall be an amount bearing same proportion to the total amount of the agricultural income tax which would have been payable on the total agricultural income had no part of it been exempted as the unexempted portion of the total agricultural income bears to the total agricultural income.

Section 3 therefore clearly indicates that the tax on agricultural income was categorized under two distinct heads, one called agricultural income tax and the other termed agricultural super tax. The intention of the legislature was perfectly clear in keeping these two categories of tax separately for not only have these two categories been separately dealt with for the purpose of exemption in as far as their rates are different but they have been spoken of as two separate types of tax. The fact that in the Schedule there were two separate parts made is a clear indication to our minds of the intention

1939
Rate First
Assessment
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Tax
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152
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 Decided
 1948, 1

of the legislature to keep those two parts separate and that nothing of the one part was going to affect, add to or detract from the provisions of the other part.

For the reason given above we answer the question in the negative.

Factors will bear their own costs of this reference.

Reference answered.

CIVIL MISCELLANEOUS

Before Mr. Justice Bhargava and Mr. Justice Upadhyaya

HAZARI LAL (Applicant)

v.

153
 March 27
INCOME TAX OFFICER, KANPUR (Respondent)

Issue arising:—*Whether order to assess or reassess returnable—Timing of action taken in assessment made in "consequence of" or "in pursuance of" order of higher authority applied in an reference—Scope of—Income Tax Act, 1922, s. 24 (2), 24 (3), 24 (4) and 24 (5)—Certainty and Finality—Plus of alternative remedy in—Constitution of India, 1950 Art. 226*

On 16 March 1948 the Income-tax Officer issued a notice under s. 24 (2) (a) of the Income Tax Act—issuance of income taxing assessment by notice of its issuance or failure on the part of the assessee within eight years of the end of the year of assessment—in the absence or respect of his failure for the assessment year 1945-46 and reassessed him accordingly. The Appellate Income-tax Commissioner allowed the appeal against this assessment on the ground that the notice or summons issued in the financial year 1944-45 so that the assessee could not be said to have escaped taxation or to have evaded the assessment year 1945-46.

The Income-tax Officer accordingly issued his order for the assessment year 1945-46 but went on to state on 4th January 1949 a fresh notice under s. 24 (2), (a) for re-assessment of the assessee for the assessment year 1946-47. The objection that the notice was barred by time and that further proceedings based on the same would be illegal and without jurisdiction being overruled and the matter coming to the High Court.

through a petition under Art. 226 of the Constitution for the appropriate relief.

Mold (i) that the matter is quiescent in order to be in time filed to be served on or before 1st March 1955 and was therefore satisfied.

(ii) that the said matter could not be deemed to be an consequence of it to give effect to any finding or decision contained in the order of the appellate authority and the benefit of the second proviso to rule (3) of s. 24 flowing from the fact that any future claim or statement or reply could not accordingly be avoided in due time.

(iii) that in order to attract the application of the proviso above it is necessary—

(a) that the finding or decision contained in the appeal has later must be material and necessary for the disposal of the appeal and must essentially be confined to or affect only such parties who are parties to the proceedings or those who are immediately concerned with or interested in the proceedings and are properly represented by the appeal parties.

(b) that the matter must arise automatically and directly follow from the said finding or decision without any conscious intention or assumption of subsequent facts or circumstances. *B. C. Prasad v. Prasad Choudhary* (1) holding that the second proviso to s. 24 (3) attracted (a) is of the Constitution is so far as it affected strangers in the present, was applied.

E. Mulhalla Jaiswal v. Commissioner of Income Tax, U. P. C. P. and Belur (1); *Durgam v. Ciba* (2); *In re an Application Between Etharagiri and Laxminagar and Pancham Jaiswal Insurance Company* (3) and *Etharagiri v. Laxminagar and Pancham Jaiswal Insurance Company* (4) applied.

Mold further that the plea of alternative remedy is not available in a case for prohibition and that even in a case for injunction it should not prevail where the alternative remedy involves substantial hardship and harassment to the petitioner such as the expenses and all incumbrances of further process, etc. including payment of the supposed tax under a ruling law.

Civil Miscellaneous Writ no. 1223 of 1954

The facts appear in the judgment.

P. N. Pradhan for the applicant.

Gopal Behari for the opposite party.

1955, 11, 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

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Revenue
 v.
Income Tax
Commissioner
Bombay

The judgment of the Court was delivered by—
 BHASKARA, J.—The petitioner, Harnar Lal, has invoked the power of this Court under Article 226 of the Constitution for issue of a writ of certiorari to quash a notice issued under section 44 of the Income Tax Act by the opposite party on him on the 4th of January 1948 and for issue of a writ of prohibition directing the opposite party to refrain from taking proceedings for assessment of the petitioner for the assessment year 1946-47. The petitioner was a partner in Firm Harnar Lal Bales Lal in Kanpur, which was registered under section 28 A of the Income Tax Act. He was an inmate in his personal capacity and for the year 1945-47 an assessment order under section 29(3) of the Income Tax Act was passed in his case on the 21st of August, 1946. For the following assessment year 1947-48 the order of assessment under section 29(3) of the Act was passed on the 26th of September 1947. On the 13th of January, 1948, the wife of the petitioner purchased a house by means of a registered sale deed for a total price of Rs 18,000 out of which Rs 500 had been paid as earnest money on the 26th of December, 1945, and the balance of Rs 18,000 was paid on the 19th of January, 1946, at the time of execution of the sale deed. The opposite party receiving information of the disposition, issued a notice under section 44(3) (a) of the Income Tax Act on the 27th of March 1948 to the petitioner in respect of his assessment for the year 1947-48 and following up that notice he made a fresh assessment on the 25th of February 1949 by adding a sum of Rs 12,500 to the income which was originally assessed under the assessment order, dated 26th September, 1947. The petitioner objected to the assessment of his income under section 24 for the year 1947-48 but that objection was disregarded. The petitioner then went up in appeal. The Appellate Assistant Commissioner of Income-tax, by his order dated 20th July, 1950 accepted the appeal and deleted the addition which had been made in the income for the assessment year 1947-48. He further gave direction to the Income-tax Officer to revise the assessment in the light of the order. When giving

the decision, the Appellate Assistant Commissioner of Income tax noticed the fact that the purchase of the house by the wife of the petitioner had taken place on the 15th of January, 1946, and the entire consideration had been paid by that date so that the previous year available for the assessment of the income, which had been made and completed on the 15th of January, 1946, was the financial year 1945-46. The financial year 1945-46 was not the previous year for the assessment year 1947-48 in respect of which the notice under section 34 had been issued in pursuance of which this appeal had been made as income in the hands of the petitioner. On this view, the Appellate Assistant Commissioner of Income tax held that the addition of Rs 12,800 in the assessment for the year 1947-48 was without any justification. On receipt of this order of the Appellate Assistant Commissioner of Income tax, the opposite party, in addition to giving effect to that order by reversing the assessment for the year 1947-48, issued a notice under section 34(1) (a) of the Income Tax Act to the petitioner for reassessment of his income for the assessment year 1946-47. This notice under section 34 in respect of the assessment year 1946-47 was issued on the 4th of January, 1946. The petitioner objected to the issue of this notice principally on the ground that it was barred by time, so that the Income tax Officer had no jurisdiction to take proceedings against the petitioner for the assessment year 1946-47. The reply to this objection was sent by the Income tax Officer on the 28th of July 1946, stating that the proceedings were legal and could not be dropped. Thereupon the petition was moved by the petitioner on the 26th of August, 1946. In these circumstances, the question, that principally arises for decision by us, is whether the notice dated the 4th of January 1946 issued by the opposite party to the petitioner in respect of the assessment year 1946-47 was or was not barred by time.

The ordinary period within which a notice under section 34(1) (a) of the Income Tax Act could be validly served as an income under the Income Tax Act as it was

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Hindi Lal
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Laxmi Lal
Gupta
Bachchan
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Appeals 1

in 1958 was a period of eight years computed from the last day of the assessment year 1946-47, so that ordinarily a notice under section 34(1) (a), in order to be in time, had to be served on or before the 31st of March 1955. On the other hand, the notice now impugned was issued on the 5th of January 1954, long after that period of limitation had expired. In these circumstances on behalf of the opposite party reliance was placed on the words proviso to section 34 (3) of the Income Tax Act, which is as follows:

Provided further that nothing contained in this section limiting the time within which any action may be taken or any order, assessment or re-assessment may be made shall apply to an assessment made under section 37 or to an assessment or re-assessment made on the income or any person in consequence of an order given effect to any finding or direction contained in an order under section 31, section 33, section 33 A, section 33 B, section 46 or section 66 A.

It was urged on behalf of the opposite party that if this proviso applied to the notice dated 4th January, 1954, and to the further proceedings for assessment or re-assessment to be taken in pursuance of it, the limitation on the period for issue of notice or for passing an order of assessment or re-assessment contained in section 34 (1) or section 34 (3) would not apply, so that it would be permissible for the opposite party to issue a notice and to make an order of assessment or re-assessment without being governed by any period of limitation. This interpretation of the proviso is in our opinion, perfectly correct but the question that we have to consider is whether this proviso is or is not applicable to the facts of this case.

In interpreting this proviso it appears to us that two aspects have to be kept in view when considering the effect of an order under section 31, section 33, section 33 A or section 33 B. An order under section 31 is passed by the Appellate Assistant Commissioner of Income tax, when deciding an appeal. An order under section 33 is passed by the Income tax Appellate Tribunal

on a second appeal against the order passed by the Appellate Assistant Commissioner of Income tax under section 31. The opinion of the High Court under section 66 is the decision of the Supreme Court on that opinion of the High Court under section 66 A is also given in proceedings which have passed through the steps of an order by the Appellate Assistant Commissioner of Income tax under section 31. The powers that are exercised by the various authorities which can thus pass orders under section 31, section 33, section 66 or section 66 A, are powers which can be exercised by an appellate authority or by authorities and courts to whom further appeals or references arising out of the appellate order lie. The scope of the orders that can be passed is therefore, to be determined by the powers which an Appellate Assistant Commissioner of Income tax has when passing an order under section 31 of the Income Tax Act. The very fact that the Appellate Assistant Commissioner of Income tax, when making an order under section 31 is dealing with an appeal filed by an assessee in respect of an assessment order indicates the scope of his jurisdiction to give findings and to make consequential orders. The various orders, which an Appellate Assistant Commissioner of Income tax can make are decided in section 34 (3) although there is no detailed provision about the findings which he can record. It appears to us however that from the very nature of the jurisdiction which an Appellate Assistant Commissioner of Income tax possesses it must follow that his power of recording findings is limited to matters which he is called upon to decide when passing an order in appeal in conformity with the decision laid down in section 34 (3). Any order passed by him, which is beyond the scope of section 31 (3), would be an order without jurisdiction and, similarly, any finding recorded by him which is not necessary for the purpose of making an order covered by section 31 (3) would be a finding without jurisdiction. Further, when applying the second proviso in section 34 (3) of the Income Tax Act the Income tax Officer is only competent to take into account orders which are in conformity with

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Section 31
Section 33
Section 66
Section 66 A
Section 34

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Federal Trust
(British
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[Supra.]

the provisions of section 51 (7) and findings which are necessary for passing those orders. Orders, which are outside the scope of section 51 (5), or findings which are not at all necessary for making such orders cannot be taken into account by the Income tax Officer for the purpose of helping on the second proviso to section 54 (2) which we are now considering. That Gopal Behari, learned counsel for the opposite party in this connection, urged before us that the word finding had nowhere been defined in the Income Tax Act nor had its scope been indicated and we should in interpreting this word be guided by the proviso who was anxious the meaning ascribed to that word as common use and should not draw any aid from the word as defined or as limited by the provisions of the Code of Civil Procedure. The word finding, as law has a definite meaning and that is indicated by the provisions of the Code of Civil Procedure where it is indicated that a finding is a decision of a court on material questions of fact. Issues are framed on material questions of fact or law and the decision of the court rendered on such issues has been called a finding. We do not think that there is any other wider meaning of the word finding in common use which can be applied to this word as used in the proviso to section 54 (2). The word finding cannot be interpreted as to include within it any statement of fact contained in a decision irrespective of whether that fact was or was not material to the decision and whether the issue in the trial, when rendering the decision, had any bearing on that point or the question of fact and to render a decision on a matter of merely finding it as a statement of fact. The word finding interpreted in the sense as defined by us above will only cover material questions which were in a particular case for decision by the judge not leaving the case to the appeal which, being necessary for passing the final order or giving the final decision in the appeal, has been the subject of controversy between the interested parties or on which the parties concerned have been given a hearing. That this interpretation is the proper interpretation to be given to the word "finding" was also indicated by CHAKRA, C. J. in his

judgment in *S. C. Parker v. Parasram Bhurilal* (1) where the learned Chief Justice was considering the very point which is for consideration before us. In that case the question arose whether right to sue a stranger under section 54 could arise in consequence of or in give effect to any finding or direction contained in an order under section 32. The learned Chief Justice remarked

In the first place it is difficult to understand how a Tribunal can give a finding or a direction affecting a third party who is not before the Tribunal.

This indicates that the learned Chief Justice felt very doubtful about the competency of the Income-tax Appellate Tribunal to record a finding or a direction which affected a third party. Clearly, this doubt could arise only because a finding or a direction affecting a third party would not be necessary for properly disposing of an appeal under section 35 where the Income-tax Appellate Tribunal would be confirming its jurisdiction to finding matters arising in the appeal before it and would be limited to passing orders of the nature indicated in section 31. It is true that in that case the learned Chief Justice did not further pursue the line indicated by the view and preferred to base his decision on a different consideration altogether. The argument before the learned Chief Justice had merely covered round the question that the provision was ultra vires Article 14 of the Constitution to the extent that it affected proceedings against any person other than the assessee. The learned Chief Justice proceeded to examine this contention on the assumption that a finding affecting a person other than an assessee could be recorded and came to the conclusion that if so the proviso afforded no support to Article 14 so far as it affected third parties. It appears to us that if the aspect about the power of the Tribunal to record a finding affecting a third party had been examined in full in its logical conclusion it would appear that the Tribunal could not competently record

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such a finding. Of course, the question which commonly
arises is why the previous sections not only assessed
but also imposed. It has been urged that the use
of the expression "any person" was intended and could
be extended only to enlarge the scope of the proviso so
as to permit action being taken for assessment or re-
assessment in consequence of or to give effect to a finding
or a direction contained in an order under section 31
section 31 section 31, section 31 & not only against the
assessee in the appeal or the proceedings before the
appropriate authority but also against any other person.
We do not think that this was the real intention. In
proving the proviso, all the words used in it have to be
given their full significance and it is the cumulative
effect of this significance that has to be given effect to.
As we have indicated above, the very fact that findings
are recorded or directions made is evidence of the appel-
late power is the power which arises in proceedings
which have been subject to an appellate decision and
not from the findings and directions must be of the
nature which an appellate court can record or make and
consequently, the directions must be limited to the
nature referred to in section 31 and the findings must be
limited to those facts which are necessary for the purpose
of giving such directions. If this aspect is kept in view,
the purpose of the use of the expression "any person"
also becomes clear. It is true that in a judicial or quasi
judicial proceeding the orders that are passed normally
affect a person who is party to those proceedings, but
nevertheless the law that is applicable is of such a nature
that it might become necessary to give effect to the
orders passed even against a person who may not have
and directly be a party but who, it may be presumed,
has had a sufficient opportunity of being represented in
the proceedings through the actual party. Some of the
examples which appear from the power conferred on the
Appellate Assistant Commissioner of Income tax, to pass
orders under section 31 (3) of the Income Tax Act may
in this connection be mentioned. Under clause (c) of
sub-section (3) of section 31, a case can arise where the
Appellate Assistant Commissioner of Income tax must

firm with an order cancelling the registration of a firm under subsection (4) of section 23 or refusing to register a firm under subsection (4) of that section. If the registration has been refused or cancelled by the Income tax Officer, the Appellate Assistant Commissioner of Income tax may allow the appeal and direct registration of the firm. The result of that order would be that the income of the firm, whose registration was cancelled or refused, which must have been assessed to tax in the hands of the firm itself, will as frequently, on the appeal being allowed, have to be assessed to tax in accordance with subsection (7) of section 23 of the Income Tax Act in the hands of the partners. Thus as a result of the decision in the appeal against an order under section 23 (4) of the Income Tax Act in which the income appellant would only be a firm, the effect of the appellate order would have to be given by assessing tax on the share of each partner in the income of the firm in the assessment proceedings of that partner. Such partners would only be covered by the exemption any person as they cannot be held to be partners in the particular appeal which had to be filed by the firm against the order passed in its assessment proceedings under section 23 (4) of the Income Tax Act. Another similar case may be where an Income tax Officer passes an order under section 23 A for the assessment of a company deeming certain dividends to have been declared though they were not actually declared. Subsequently, on appeal, the amount declared is deemed to have been distributed as dividends might be ordered by the Appellate Assistant Commissioner of Income tax under clause (a) of subsection (3) of section 31. In the meantime, there is the possibility that the shareholders might have been assessed to tax by including in their incomes dividends deemed to have been received by them being the dividends declared as assessed to have been distributed under section 23 A. Naturally it would be necessary to grant to the shareholders the appropriate relief when the order under section 23 A is subsequently varied by the Appellate Assistant Commissioner of Income tax on appeal. In such a case to give that relief there would have to be a reassessment.

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dictated in section 31. In this view, further, there can be no findings or directions in an order by an Appellate Assistant Commissioner of Income tax which would affect the rights of small taxpayers, who can be described as small persons, in the manner in which the effect on them was considered by CHITRA, C. J., in the case cited above *S. C. Pradhan v. President, District Board* (1). This meaning is our opinion should be accepted not only for the reasons indicated above but for the further reason that it is one of the principles of interpretation of statutes that the court should be chary of accepting any interpretation which tends towards the invalidity of a provision of law and should prefer an interpretation which would ensure to the validity of that law. On the interpretation given by us it would appear that no question of the proviso offending against Article 14 of the Constitution would arise. The class of persons covered by the expression "any person" would not be a class who might be adversely affected by a finding or decision rendered by an Appellate Assistant Commissioner of Income tax. The class of persons covered by the expression "any person" would be persons belonging to those persons who, under the Income Tax Act are intimately connected with and interested in the proceedings taken against the assessee and whose assessments under the Act are affected by the orders passed in those proceedings. Such a classification would clearly have a nexus with the object for which the proviso was introduced. The object of the proviso was to enlarge the function so that orders passed in appeal or findings given when passing those orders in appeal do not become inoperative and can be adequately given effect to. This purpose is achieved if the persons who are really interested in those proceedings are also governed by the findings or directions contained in the appellate order. The classification is based on their interest in the proceedings against the assessee or on the fact that under the law itself their assessments will be dependent on the orders passed in the proceedings against the assessee. There being such a classification, the proviso would be

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a valid one and, consequently, we think that the interpretation we have placed above should be accepted. Examining the previous case in the light of our view above it is clear that, in this case, the Appellate Assistant Commissioner of Income-tax was only competent to record the finding that the sum of Rs 12,880, which was in question in the appeal before him, was not income relevant to the assessment year 1947-48. The question whether this income existed or was earned in the previous year relevant to the assessment year 1946-47 was not before him for decision, nor was it a point on which it was essential for him to record a finding before appropriately deciding the appeal before him. The only material point for his consideration was whether this income was earned by the petitioner in the previous year for the assessment year 1947-48. If it was not so, there was no need at all for the Appellate Assistant Commissioner of Income-tax to go into further questions, such as the question whether it was income of such nature as to be liable to income-tax or whether it was income earned by the petitioner or by some one else, or whether it was income earned in the previous year relevant to the assessment year 1946-47. There were all questions which were beyond the scope of his jurisdiction when deciding the appeal of the petitioner relating to the assessment year 1947-48. Consequently, for the purpose of applying the proviso in section 54(B), the Income-tax Officer was entitled only to take into account the finding recorded by the Appellate Assistant Commissioner of Income-tax that the sum of Rs 12,880 was not the income of the petitioner for the assessment year 1947-48 and the Income-tax Officer could not treat as a finding the remark made or the view expressed by the Appellate Assistant Commissioner of Income-tax that this sum was the income of the assessee for the assessment year 1946-47. That was a point, as we have said earlier, which the Appellate Assistant Commissioner was not called upon to decide and was not a point on which he could competently record a finding.

There remains the further question whether the present proceedings bring relief against the petitioner

can be perceived even on the basis of these findings which the Appellate Assistant Commissioner could reasonably give in his order under section 34. The relevant finding which the Appellate Assistant Commissioner of Income tax could record, was that the sum of Rs 12,800 was not the income for the assessment year 1947-48 and what we have to examine is whether it can be held that the notice issued under section 34 of the Act to the petitioner in respect of the assessment year 1948-49 can be held to be action taken in consequence of or in pursuance of the competent finding or direction recorded in the order of the Appellate Assistant Commissioner of Income tax, i.e., the finding that the sum of Rs 12,800 was not the income for the assessment year 1947-48. On this aspect of the case, we have had some difficulty as we have not found that the exact scope and meaning of the expression "in consequence of" has at any place been defined or laid down in any decision by the courts. In the dictionary the expression "in consequence of" has been equated with "as a result of" (see *A New English Dictionary* by Sir James A. H. Murray Volume II, containing the letter "c", edited by W. A. Craig, Henry Bradley and C. T. Onions) or by virtue of or as the effect of (see *Webster's New International Dictionary* Volume I, Second Edition). We have not been able to derive much assistance from these meanings given in the dictionary. This shows a some remote connection between the notice issued under section 34 to the petitioner by the assessment year 1948-49 and the finding of the Appellate Assistant Commissioner that the sum of Rs 12,800 was not the income for the assessment year 1947-48 cannot be denied. The finding that the sum was not the income for the assessment year 1947-48 can lead to the conclusion that it may be income for some other year and, amongst those some other years, would be included the assessment year 1948-49. Thus a remote connection between the notice issued under section 34 and the finding recorded by the Appellate Assistant Commissioner of Income tax does exist, but we are unable to accept the view that such a remote

MAJOR LEADERS
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Corporate
Partnership

1130 connection by itself can satisfy the requirement that the
1131 action taken must be in consequence of the finding.
1132 The action, which the Income-tax Officer took in the
1133 proceedings for the assessment year 1947-48 (with a view
1134 to define the amount in accordance with the direction of
1135 the Appellate Assistant Commissioner and to reduce the
1136 tax assessed accordingly, would certainly be action taken
1137 in consequence of the order of the Appellate Assistant
1138 Commissioner but in order to take this action for a
1139 deficient year the Income-tax Officer had to rely not
1140 merely on the finding of the Appellate Assistant Com-
1141 missioner of Income-tax but on other facts or circum-
1142 stances. Under section 34(1)(c) of the Income Tax
1143 Act this notice could be issued against the petitioner by
1144 the Income-tax Officer only if he had reason to believe
1145 that, by reason of the omission or failure on the part of
1146 the petitioner to disclose fully or truly all material facts
1147 necessary for his assessment for the year 1946-47, this
1148 sum of Rs 12,800 had escaped assessment for that year.
1149 The various factors on which he could act, were then
1150 the omission or failure on the part of the petitioner to
1151 disclose fully or truly all material facts for his assess-
1152 ment for the year 1946-47 and thereafter his satisfaction
1153 that it was as a result of that omission or failure on the
1154 part of the petitioner that the income for the assess-
1155 ment year 1946-47 had been under-assessed. The
1156 finding given by the Appellate Assistant Commissioner
1157 of Income-tax hardly touches any of these factors. The
1158 relevant finding which we have taken into considera-
1159 tion is as we have indicated above, merely that this sum
1160 of Rs 12,800 was not assessed for the assessment year
1161 1947-48. In that finding there is nothing to show that
1162 there had been any omission or failure on the part of
1163 the petitioner to disclose fully or truly all material facts
1164 necessary for his assessment for the assessment year 1946-
1165 47. There was again nothing in that finding which
1166 would show that any income for the assessment year
1167 1946-47 had been under-assessed or had escaped assess-
1168 ment. All that the finding could indicate was that
1169 possibly if this sum represented income it had escaped
1170 assessment in some year prior to the assessment year

1945-46. Thus all the main factors, on the basis of which action under section 34 (I) (a) of the Income Tax Act could be taken by the Income tax Officer, had to be found by him quite independently of the finding recorded by the Appellate Assistant Commissioner of Income tax. He had to satisfy himself, independently of that finding that that sum of Rs 12,890 represented taxable income—secondly, he had similarly to find independently that that sum was income for the assessment year 1945-47 and, thirdly he had to find again independently of the finding recorded by the Appellate Assistant Commissioner of Income tax that the under assessment was the result of the omission or failure on the part of the petitioner to declare fully or truly all material facts necessary for his assessment for the assessment year 1945-47. It would thus appear that the notice issued under section 34 (I) (a) for the assessment year 1946-47 was really a consequence of independent facts which the Income tax Officer had before him in order to justify his belief that the requirements of this provision of law were satisfied. The issue of the notice did not automatically or directly follow from the finding which was recorded by the Appellate Assistant Commissioner of Income tax. In fact, the finding recorded by the Appellate Assistant Commissioner may have been a reason why the Income tax Officer thereafter started looking for material on the basis of which he could come to believe that the provisions of section 34 (I) (a) were applicable to the assessment of the petitioner for the assessment year 1946-47. The actual applicability of section 34 (I) (a) to the assessment of the petitioner for the year 1946-47, did not arise as a result of the finding recorded by the Appellate Assistant Commissioner. It appears to us, therefore that the present notice, dated 4th January 1946 issued to the petitioner cannot be said to be action taken by him in consequence of or to give effect to the finding or decision contained in the order under section 31 passed by the Appellate Assistant Commissioner on 29th July, 1935.

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Should Let
Income Tax
Officers
Review ?

This view of facts, though not directly supported

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Section 34 of the Income Tax Act requires that the Income tax Officer should have received definite information and that definite information should have led to the discovery that income, profits and gains chargeable to income tax had escaped assessment or had been under assessed or had been assessed at too low a rate or had been the subject of erroneous relief.

Then the idea conveyed by the expression "in consequence of" was interpreted as requiring that the definite information should have led to the discovery. In the same judgment, it was further remarked:

There must be a causal connection between the definite information and the discovery, and where there is no such causal connection, section 34 is not applicable.

Applying that test to the case before us, we find that we are unable to hold, that the finding recorded by the Appellate Assistant Commissioner of Income tax that the sum of Rs 12,440 was not income for the assessment year 1947-48 led to the actual notice, by the Income tax Officer of issuing notice under section 34 (1) (a) of the Income Tax Act irrespective of the assessment year 1948-49. In fact, there is no causal connection between the two. The issue of notice was not caused by the finding. It was the result of an independent belief of the Income tax Officer on the various factors which have been mentioned above and which persuaded him to issue such notice. The expression "in consequence of" was also interpreted in *English v. Dwyer v. Gher* (2). In that case the expression which came up for interpretation, was where default results from the injury

Galassi, M. E., in his judgment, interpreted the words as follows:

An applicant for compensation on this scale must prove an injury by accident arising out of and in the course of an employment within the Act, and death as the result of the accident. When that is proved, all is done that is necessary to establish a claim to compensation. The question in this case is whether death resulted from the injury. In my opinion that means, whether death in fact resulted from the injury. If it did in fact, it makes no matter how improbable or how unusual the result may have been. The question whether one event results from another involves an examination of the chain of causation. There must be no break in the chain. If there is a break then the final event is not the result of the initial event. But the break must be an actual efficient break, a series of intervening interventions, from which a new chain of causation commences. To constitute an actual efficient break in the chain, the predominant and really efficient cause of the final event must be the new act intervening. Otherwise there is no such break in the chain as to prevent the final event from being the result (though an improbable result) of the initial event.

It appears to us that an application of these remarks of *Citizens*, 441 U.S. 39, to the expression "in consequence of," which, as we have said above, has been equated with "as a result of," leads to the same view which we have expressed above. In the present case, there was clearly a break between the finding of the Appellate Assistant Commissioner of Income tax in respect of one assessment year and the action of the Income tax Officer in issuing the notice under section 34 (1) (a) in respect of a different assessment year. The break was that the Income tax Officer had to rely on entirely new facts, which did not even go to the finding in order to arrive at the belief which could justify the issue of the notice. These new facts, which he had to take into account for his belief, were, as we have mentioned earlier, the amount of salaries or

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Florida State
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 (Karnataka)
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 Income Tax
 Appeal
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the part of the petitioner to make a full and true declaration of facts necessary for his assessment that the sum of Rs 12,890 was income liable to assessment and that this income had been earned in the previous year relevant to the assessment year 1946-47. It was clearly an actual efficient cause, as there was intervention of new facts. The predominant and effective cause for the issue of the notice was based on the independent new facts and not on any belief based on the finding recorded by the Appellate Assistant Commissioner of Income tax. Consequently applying the principle laid down by Collins, M. R. it would appear that we must hold that the issue of issuing the notice under section 34(1)(a) for the assessment year 1946-47 was not the result of the finding recorded by the Appellate Assistant Commissioner of Income tax in the appeal in respect of the assessment year 1945-46. MATHEW, L. J. in the same case understood what he considered was the effect of the word "result". He said:

Death may result from an injury without being the probable or the natural consequence of it.

This remark gives an indication that the action of the Income tax Officer could be said to be in consequence of the finding if it could be the probable or the natural consequence of it. As we have indicated earlier the reassessment for the assessment year 1947-48 by the Income tax Officer was certainly the probable and the natural consequence of the order of the Appellate Assistant Commissioner but the issue of the notice for the assessment year 1946-47 was not the probable or natural consequence of the finding. It was, in fact, the consequence of independent facts which the Income tax Officer had reason to believe. In this connection we may also refer to the remarks of Mr. Justice CHANDLER in *an Arbitration between Dillingham and Lamson and Folsom American Insurance Company (1)*. There the learned Judge had to interpret an insurance policy where the insurance money was payable if the death was not due to intervening cause. The learned Judge held:

The expression new cause intervening was the same as other cause intervening and meant some
 (1) 247 L. R. 164.

new and independent cause which might, together with the original cause, produce certain results.

1889
Kilgobin Ltd.
Second Tax
Credit
S. 47(1)
Marginal?

The decision was upheld on appeal and the appellate judgment is reported in *Erkington v. Lancashire and Yorkshire Accident Insurance Company* (1). There is much indicated upon this, in order that an act should be the consequence of some earlier incident, there should be no intervention of an intermediate incident which itself does not flow from the original incident. In the case before us, if the issue of the notice under section 34 for the year 1945-46 could have followed the finding of the Appellate Assessee Commissioner without the intervention of any new facts or circumstances and as a result of only those facts and circumstances which themselves directly flows from the competent finding of the Appellate Assessee Commissioner of Income tax, it could have been held that the action of issuing the notice was the consequence of the finding of the Appellate Assessee Commissioner. On the other hand, what we find is that the finding of the Appellate Assessee Commissioner of Income tax was only remotely connected with the issue of the notice issued, as it may be held that it was because of that finding that the Income tax Officer started looking for material to find out in respect of which year he could possibly issue notice under section 34(1) (a) of the Income Tax Act. The issue of the notice itself did not follow the finding or other facts which necessarily arose out of that finding.

Consequently on the view we have taken above, we have to hold that the proviso to section 34(3) of the Income Tax Act does not govern the notice issued against the petitioner on the 4th of January, 1946. As we have already said earlier, the normal period of two years had done under section 34(1) (a) had already expired when the notice was issued (a), since the second period in section 34(3) relied upon by the revenue party did not apply, the notice was time-barred when issued.

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v.
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Commissioner,
Lahore
[1939] 1
S.W.2d 1

Before concluding, we may take notice of a point that was raised by learned counsel for the opposite party to the effect that, in this case, there was no point arising on the part of the opposite party of extending jurisdiction on account of the writ of *habeas corpus* and consequently that was not a fit case where the Court should exercise its powers under Article 226 of the Constitution. We do not think that, in the circumstances of this case, this contention has any force. Naturally, it is true that this Court is hesitant in interfering with proceedings before authorities specially created with deputed those proceedings by issue of a writ of *certiorari* and that Court refrains from doing so if the Court is of the opinion that the alternative remedy is available and convenient. The considerations, however, are different where the principle was sought as a writ of prohibition. If no more is required than the petition to the ordinary remedy permissible under the Income Tax Act, there is no doubt that the petitioner may be able to obtain relief if he ultimately comes up to this Court by a reference under section 68 of the Income Tax Act. He may even get relief at an earlier stage under section 69 from the Income tax Appellate Tribunal or under section 81 from the Appellate Assistant Commissioner of Income tax but, before he can get that relief he may have to submit to proceedings for re-assessment of his income for the assessment year 1942-43. The proceedings for assessment are onerous. The Income-tax Officer, who is to take proceedings, has refused to accept the plea of the petitioner and, if we do not interfere with his petition and grant him the relief sought, he would have to incur expenses and undergo all the inconvenience of going again through those proceedings for that assessment. He may also have to pay the tax assessed as a result of those proceedings. Before he can subsequently obtain relief from the Appellate Assistant Commissioner of Income-tax or the Income tax Appellate Tribunal or from this Court. It appears to us that in such a case it is appropriate for us to exercise our powers under Article 226 of the Constitution so as to relieve him of unnecessary hardship and harassment, so that we consider that, on the view taken by us above, the

petitioner should be granted the relief which he has prayed for.

As a result, we allow the petition and quash the notice dated 4th January, 1955, issued against the petitioner under section 34(1)(a) of the Income Tax Act. Since we are quashing the notice which automatically has the result that the Income-tax Officer cannot now maintain the jurisdiction which we have found he did not possess, we do not think that there is any need for issuing a writ of prohibition. The petitioner will be entitled to his costs from the opposite party which we fix at Rs. 400. The same amount is assessed as the amount of fee for learned counsel.

Prisoners allowed

CIVIL MISCELLANEOUS

Before Mr. Justice Chatterjee and Mr. Justice

P. D. Bhargava

SRIPAT NARAIN RAI (Petitioner)

v

BOARD OF REVENUE AND OTHERS (Respondents)

(PARTIAL)

Board of Revenue.In pursuance of a Judicial Member rejecting my application for revision—Judicial Member appointed and took over as Administrative Member—Competency of the decision is not under the relevant order and subject revision without notice to opposite parties—*U. P. Zamindari Abolition and Land Reforms Act, 1955*, ss. 29, 29C and 31—*Uttar Pradesh Zamindari Abolition Act 1951*, ss. 7, 11A and 11B—*Land Revenue Manual*, rr. 182 and 183—*Uttar Pradesh Treasury Act 1939*, s. 273—*Code of Civil Procedure 1908*, s. 131 (2) CLPOT = 1-4 and 5—*Construction of Order 1950*, Art. 22B.

An application to the Board of Revenue for the revision of an order under the Zamindari Abolition and Land Reforms Act was dismissed as futile by the Judicial Member concerned. The Judicial Member was later appointed and took over as the Administrative Member, Board of Revenue. His successor as a Member to that office did not take the revision order and submitted the revision without notice to the opposite parties.

1955
Hajipur, Lal.
Jagannath
Gupta
Kumar
Mangal 17

1955
April 15

1284
 JAMES
 MOHAMMAD
 ALI
 v.
 BOARD OF
 REVENUE

On a petition for a writ in the nature of certiorari to quash the lower order.

HELD: (i) that the Board of Revenue is a quasi-judicial body for the disposal of judicial work is concerned. A Judicial Member (Member) who is transferred to and put in charge of the work on the administrative side of the Board of Revenue cannot be deemed to surrender or continue attached to the post for the purpose of O XLVII r. 3 of the Code of Civil Procedure so as to enable an appeal from time to time to review his orders passed while acting as a Judicial Member.

(ii) that s. 228 (5) of the United Provinces Land Revenue Act, to the effect that a single Member of the Board of Revenue shall not have power to alter or reverse a decree or order passed by Board or any other Member than himself does not extend or apply to proceedings under the Zamindari Abolition and Land Reforms Act.

(iii) that neither the United Provinces Tenancy Act, nor the rules framed thereunder including r. 188 of the Revenue Manual apply to revisions under the Zamindari Abolition and Land Reforms Act.

(iv) that it is competent for any or more of the Judicial Members who constitute the Board for that purpose to review or alter an order passed by the predecessor or predecessors in the case may be.

(v) that O XLVII r. 4 of the Code of Civil Procedure has no application to a case of this kind and it is open to a court to review and set aside an ex parte order of dismissal without notice in the opposite party.

Lalji Singh v. Pagar Lal (3) applied; *Shah v. Jagdeo* (3) approved; *Cyflut Trustee of Bengal v. Shrode Aherji* (3) (4) and *Shanki Nath v. Prithvi Nath* (3) adopted.

(vi) that proceedings by way of revision are not of essence and the fact that an order was without perfection or that there was an error apparent on the face of the record was not sufficient to justify the issue of the writ in cases in which the conclusion that the impugned order had resulted in injustice to the petitioner.

There being no such circumstances and the petitioner having had and not availed of the alternative remedy of moving the Board itself for appropriate relief the petition must be dismissed with costs.

A. M. Ali v. *P. E. Singh* (3) and *Prasen Singh v. The Additional Commissioner, Agartala* (3) followed.

1958 A. L. J. 135
 1959 L. L. R. 11 Cal. 343
 1957 S. T. R. 107-8 C. 227

1957 B. C. 264
 1958 L. L. R. 41 Cal. 178
 1957 A. L. J. 134

Civil Miscellaneous Writ No 259 of 1955 The facts appear in the judgment.

Shawari Prasad for the applicant.

Satyendra Narayan Singh for the opposite parties.

The judgment of the Court was delivered by—

CHANDRASEKAR, J.—This is a writ petition under Article 226 of the Constitution praying that a writ of certiorari be issued quashing an order of the Board of Revenue dated 15th May 1954.

The necessary facts of the case are in a short compass. Respondents nos. 2 and 3 filed an application under section 50 of the U. P. Zamindari Abolition and Land Reforms Act for being reinstated in the plots in that on the ground that they were addressless. The petitioner contested the application and demanded that the respondents had acquired addressless rights. The trial court decided the case on 27th February 1954 holding that the respondents had acquired the rights of addressless. The petitioner then went up in appeal to the Commissioner and the Additional Commissioner allowed the appeal by his order dated 4th June 1954. He held that the respondents had not acquired addressless rights. On 17th January 1955 the respondents filed a revision petition before the Board of Revenue. This petition appears to have been placed in Chambers of a Member of the Board Mr. A. N. Sengupta who dismissed it on 15th April 1955. He dismissed it on the ground that the revision was barred by some assumption as the order sought to be revised was dated 4th June 1954, and the revision petition was filed on 17th January 1955. It appears that the Board usually allows a period of four months for filing a revision application. According to the respondents they did not come to know of the dismissal of their revision for a long time and it was on 9th January 1956 that respondents no. 2 filed an application purporting to be under section 181 Civil Procedure Code praying that the *ex parte* order of the 15th April 1955 be set aside. In the meantime Mr. A. N.

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Supra had ceased to be a Judicial Member of the Board and was put in charge of the administrative work, with headquarters at Lucknow. The application for setting aside that ex parte order came up before Mr. Ram Kar Singh a Judicial Member of the Board, and Mr. Ram Kar Singh allowed the application on 19th May, 1954 without issuing any notice of the application to the petitioner. It would thus appear that the respondents were not heard when the revision application was dismissed and the petitioner was not heard when the dismissal order was set aside. After setting aside the order dismissing the revision, a date was fixed for hearing the revision on merits and notices were ordered to be issued to the parties. Before, however, the revision could be heard by the Judicial Member, the present writ petition was filed on 10th January 1958 and an interim order was issued by the Court directing the Board of Revision not to hear and decide the revision till further orders from the Court. The writ petition itself has now come up for final hearing before us.

Learned counsel for the petitioner has urged a number of grounds in support of the writ petition, but we shall only deal with those which are necessary to be decided because in our view, on none of the points mentioned by the Court will not be justified, for substantial justice has been done and the revision filed by the respondents has now to be heard and decided on its merits.

The first point that we have to consider is whether Mr. B. K. Singh had any jurisdiction to set aside the order passed by Mr. A. N. *Supra*. Learned counsel for the petitioner has contended that the application filed by the respondents on 15th January, 1958 should be treated as an application for review, and not one under section 151 Civil Procedure Code. It does appear that in the application it is stated that there was an error apparent on the face of the record of the case, which is a ground which could be urged under the provisions of Order XLVIII, rule 1, Civil Procedure Code. There has been a great deal of controversy before us on the question whether the Code of Civil Procedure applies to

applications for review filed in the Board of Revenue in proceedings under the Zamindari Abolition and Land Reforms Act. But we do not consider it necessary to decide that question and shall assume that the Code of Civil Procedure applies to suits for review filed before the Board of Revenue. The relevant rule on this point is rule 5 of Order XLVII. The material words of this rule are:

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When the Judge or Judges continue or
continue attached to the court at the time when the
application for a review is presented, each
Judge or Judges of the court shall hear the applica-
tion.

The argument of learned counsel is that Mr. A. N. Sengupta will continue to be attached to the court and he was the only Member of the Board of Revenue who was legally authorised to hear and decide the application for review. We do not agree with this contention of the learned counsel. The word Court used in rule 5 of Order XLVII is significant and the question that we are to consider in the present case is whether Mr. A. N. Sengupta continued to be attached to the court on the date when the review application was allowed by Mr. B. K. Singh. As already stated in the beginning of this judgment Mr. Sengupta was relieved of his duties of a Judicial Member of the Board before the application was filed and he was appointed as Administrative Member of the Board with his headquarters at Lucknow. After the appointment as Administrative Member he had no judicial work to perform. Thus being the position, we think it cannot be said that he continued to be attached to the court as such. The Board of Revenue has amongst its members both Administrative and Judicial Members. The Judicial Members dispose of Judicial work of the Board and the Administrative Member deals with the administrative work. The Board of Revenue is not a court while dealing with administrative work and can be said to be a court only so far as disposal of judicial work is concerned. Mr. Sengupta, because of his appointment as Administrative Member, ceased to have anything to do with the judicial work of the Board of

Revenue and as such he was no longer a Member of the Board amongst as he was not in the very judicial work. Thus being the position, the provisions of Order XLVII, rule 3 do not make it obligatory that Mr. Sapat should himself have dealt with the application for review and we think the rule has no application to a case like the present.

The next point urged by learned counsel for the petitioner is that the order of Mr. Sapat could have been reversed or set aside only by two members of the Board and not by any single Member. This contention is based on three grounds urged by learned counsel. The first ground is that subsection (3) of section 218 of the U. P. Land Revenue Act applies to the case and that subsection clearly provides that a single Member would not be able to set aside or reverse a decision or order passed by Board or by any Member other than himself. The contention of learned counsel is that this subsection applies to all cases heard by the Board irrespective of the nature of the case. We do not find it possible to agree with this contention of the learned counsel. The U. P. Land Revenue Act in which this section occurs, deals with matters connected mainly with revenue administration of the State including the assessment and realisation of revenue. It does speak of the constitution of the Board of Revenue and according to section 7 of the Act the Board has been authorised to discharge its business and to make such internal division of the jurisdiction amongst its Members as it may deem fit. Sub-section (2) is important. It says that all orders made or decisions passed by a Member of the Board in accordance with such distribution or division shall be held to be the orders or decisions of the Board. The constitution of the Board with concerned matters is dealt with in Chapter II in which section 7 occurs. Chapter III provides for the assessment of crops and lands, Chapter IV for the revision, Chapter V for settlement of revenue, Chapter VI for measurement or revision of measurement, Chapter VII for partition etc. of lands, Chapter VIII for collection of revenue, Chapter IX

for procedure of revenue courts and revenue officers and Chapter X deals with the subject of appeals, rehearings and remands. Section 228 occurs in this Chapter. Learned counsel for the petitioner contended that up to the first paragraph of section 219 the provisions of this Chapter were confined to cases arising under the U. P. Land Revenue Act. But he says that the second paragraph of section 219 and sub-section (3) of section 220 apply to all cases coming up for hearing before the Board of Revenue. As regards the second paragraph of section 219 we think it is sufficient to state that it could not be made to cover all cases coming up before the Board because every enactment, the U. P. Tenancy Act, Zamindari Abolition and Land Reforms Act, contains provisions concerning institution of appeals. If the second paragraph was made to apply to all cases coming up before the Board of Revenue, the other similar provisions under the other Acts would have to be held to be superfluous. Even section 228, sub-section (1) obviously refers to cases which have been decided under the United Provinces Land Revenue Act. The usual legislative practice is to provide in the Act itself for appeals and remands which arise under it. We see no reason for holding that in the U. P. Land Revenue Act an extraordinary procedure has been followed and provisions have been inserted as parts of sections 219 and 220 which are of general application. We presume that the usual legislative practice has been followed in the U. P. Land Revenue Act as well, and both sections 219 and 220 are made to apply only to cases which arise under the U. P. Land Revenue Act. The points now arise out of proceedings under the U. P. Zamindari Abolition and Land Reforms Act and would therefore not be governed by the provisions of sub-section (3) of section 220 of the Land Revenue Act.

The other arguments advanced by learned counsel to support the contention that only two members of the Board could have sat under the order is that rule 193 of the Rules framed in the Revenue Manual would apply to a case under the Zamindari Abolition and Land Reforms Act as well. This rule along with the other

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rule contained in the same Chapter of the Revenue Manual purport to have been made under the U. P. Land Revenue Act and the U. P. Tenancy Act and not under the Zamindari Abolition and Land Reforms Act. Learned counsel referred to rule 116 of the Rules framed under the Zamindari Abolition and Land Reforms Act in this connection. Rule 116 is in the following words:

The provisions contained in the U. P. Tenancy Act 1928 as regards the hearing and decision of suits under the said Act shall apply to the proceed-
ing under section 232.

The present proceedings can be said to arise out of proceedings under section 232 because the question involved was whether the respondents had acquired rights therein. But the rule only says that the provisions of the U. P. Tenancy Act are to be applied as regards the hearing and decision of suits. It has no application to the hearing of revisions arising under section 232 of the Zamindari Abolition and Land Reforms Act. It may be possible to say that suit includes an appeal, and the provisions that have been applied to suits should, therefore, be applied to appeals as well. But it is well established that a revision cannot be said to be a continuation of the suit, and rule 116 no where purports to apply provisions of the U. P. Tenancy Act to revisions arising out of suits instituted under section 232 of the U. P. Zamindari Abolition and Land Reforms Act. The provisions of the U. P. Tenancy Act may or may not apply to appeals arising out of suits instituted under section 232 of the Zamindari Abolition Act, but no rule has been framed to the effect that they can be applied to revisions. We, therefore, think that neither the U. P. Tenancy Act nor the rules framed thereunder including rule 116 can be said to apply to revisions arising out of suits under section 232 of the U. P. Zamindari Abolition and Land Reforms Act.

The third argument of learned counsel in connection with the above point was that section 271 of the U. P. Tenancy Act itself contemplates that a review applies

tion cannot be allowed by one Member of the Board of Revenue. Section 273 of the U. P. Tenancy Act has been applied to the Zamindari Abolition and Land Reforms Act by rule 248 of the U. P. Zamindari Abolition and Land Reforms Act. Learned counsel for the petitioner has argued that the rule is invalid and it is the Code of Civil Procedure which applies to review applications. We do not consider it necessary to decide this controversy. If section 273 of the U. P. Tenancy Act has not been legally applied to cases arising out of the Zamindari Abolition and Land Reforms Act, the constitution of learned counsel on the interpretation of the section need not be considered at all. Assuming that it has been legally applied to cases arising under the Zamindari Abolition Act, we think that the interpretation of the section of learned counsel is not correct. Section 273 is in the following words:

The Board on its own motion or on the application of a party to the suit may review and may rescind, alter or confirm any decree or order made, by itself or by a single member.

The constitution of learned counsel is that it is only the Board as a whole which can review either on its own motion or decision of a single Member of the Board. This argument is met by the provisions of section 7 of the U. P. Land Revenue Act. Sub-section (E) of that section as already stated says that an order passed by a Member of the Board in accordance with the description of work shall be held to be the order or decree of the Board. If in deciding a particular case the Board consists of a single Member, his order can be reviewed by a single Member, because he constitutes the Board even for the purpose of section 273 of the U. P. Tenancy Act. If the word Board is held to mean the entire body of the Members constituting the Board, a difficulty will arise where the order which is sought to be reviewed was passed by two or three of its Members. According to section 273, the Board may review or alter an order passed by itself or by a single Member. But it is not said that the Board can review or alter an order passed

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by two or three Members. So, even if the entire Board has the power to review, it has the power to review an order passed only by all the Members of the Board or by one Member of it. The whole Board will have no power to review or alter an order passed only by all the Members of the Board or by one Member of it. The whole Board will have no power to review or alter an order passed by two or three Members. The interpretation of the learned counsel for the petitioner, therefore, cannot be accepted and it has to be held that an order passed by two or more of the Members constituting the Board can be reviewed or altered by one or more Members constituting the Board for the purpose of this case, as provided by section 7 (2) of the Land Revenue Act. We, therefore, do not find it possible to accept the contention of learned counsel that in a case arising out of the zamindari Abolition and Land Reforms Act one single Member of the Board could not have reviewed his own or his predecessor's order.

The next point urged by learned counsel for the petitioner is that the application made by the respondents under section 151 Civil Procedure Code, for setting aside the order of Mr. A. M. Sengupta, could not have been allowed because such an application could be made under Order XLVII rule 1, Civil Procedure Code, and that being the position, the inherent powers of the court could not be invoked for the purpose, as there was specific provision in the Code itself for an application like this. We do not consider it necessary to decide this point, because this point can be argued before the Board of Revenue while it is hearing the revision on its merits. The point can be urged before the Board as a preliminary point at the hearing of the revision.

The next point urged by learned counsel for the petitioner is that Order XLVII Civil Procedure Code, is applicable to proceedings for review pending in the Board of Revenue and rule 4 Order XLVII provides that no application for review shall be granted without issuing notice to the other party. In the present case, notice was not issued and the review application was

allowed. On this point again the question arises whether Order XLVII Civil Procedure Code applies to proceedings for review before the Board of Revenue when arising out of cases under the Zamindari Abolition and Land Reforms Act. But we do not consider it necessary to decide this point. The position in this case has been that the respondents revision application was dismissed without hearing them. When the respondents applied for setting aside the order, the order was vacated without hearing the petitioner. So, an *ex parte* order has been vacated by another *ex parte* order. The case was still pending before the Board of Revenue and will have to be heard and decided on its own merits. The petitioner could have applied to the Board of Revenue for setting aside the *ex parte* order, dated 11th May 1954 (the order impugned before us). The order had been passed in the absence of the petitioner and the petitioner should have gone to the Board of Revenue and requested the Board to give him a hearing. We think there was another remedy open to the petitioner which he failed to avail of. His proper course was to approach the Board itself, and not to approach this Court directly with the present petition. Even on the facts, we think the petitioner's contention is not convincing.

In somewhat similar circumstances a Division Bench of this Court refused to interfere with the order of the Board of Revenue which had been passed *ex parte* and then the *ex parte* order was set aside without notice to the other party. The case mentioned above is the case of *Lajpat Singh v. Purni Lal* (1). The learned Judges pointed out that there was no authority which laid it down as a matter of law that when both parties were absent and an order was made against one of them, the court had no jurisdiction to set aside that order without hearing the other party. The learned Judges held that the provisions of Order IX, rules 8 and 14 Civil Procedure Code provided that an order made under rules 8 and 13 should be set aside without notice to the other side, but the said rules were held to apply only

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The next case of the Calcutta High Court is *Jawahar Math More v. Probhakar Dasgupta* (2). It is on all fours with the case before us. In this Calcutta case the appeal was summarily dismissed by a Division Bench of the High Court. But the order of dismissal was set aside on an application for review filed by the appellant with out issuing notice to the respondents. It was held that this order was valid even in the absence of notice, as the expression "opposite party" in Order XLVII, rule 4, Civil Procedure Code, means a party which was interested to support the order sought to be vacated. But the respondent was not considered to be such a person before the appeal had been admitted under Order XII, rule 13, Civil Procedure Code. It appears from the case of *Sahoo v. Jagjit* (3) that the Board of Revenue has also been following the same practice.

Apart from the cases mentioned above, we think that substantial justice has been done in the case and an ex parte order which the Board of Revenue considered to be wrong has been set aside with the consequence that the revision has been restored to its original number. Notices have been issued to both the parties and both the parties have been given opportunity of appearing their case before the Board of Revenue. The revision will now be heard and decided on its merits and it is expected that the party which has law and justice on its side

(1) 1954 I. L. R. 30 Cal. 582. (2) 1954 I. L. R. 40 Cal. 118.
 (3) 1957 I. L. R. 264.

should succeed. If we were to set aside the order of Mr. R. A. Singh dated 19th May 1948 we might be perpetrating an injustice which had been done to the respondents by an incorrect *ex parte* order passed by Mr. A. N. Sanyal. In such circumstances it is open to this Court to refuse to interfere in its jurisdiction under Article 226 of the Constitution. In the case of *A. M. Athani v. R. L. Sen* (2) the learned Judges of the Supreme Court observed:

Proceedings by way of execution are not courts, (see *Halsbury's Laws of England*, Huddell's Edition, Vol. 9 para. 1482 and 1481, pp. 577-578). The High Court of Allahabad had the power to refuse the writ for it was satisfied that there was no failure of justice.

This Court has also expressed the same view in the case of *Joachim Singh v. The Additional Commissioner, Agra* (3). The learned Judge observed that the mere fact that an order was without jurisdiction or that there was an error apparent on the face of the record was not sufficient to justify the issue of a writ, but in addition it had to be established that the order had resulted in injustice to the petitioner.

For the reasons given above we do not think that we should allow this writ petition. It is accordingly dismissed, but in all the circumstances of the case we direct that the parties bear their own costs.

Petitioner dismissed.

APPELLATE CRIMINAL

Before Mr. Justice Mulla and Mr. Justice Nigam

DRANPAT

VS
STATE

Criminal Trial—Provisions under s. 38(3) of the Indian Army Act 1911—Question validity of—Indian Evidence Act, 1911, ss. 38 and 39 (3) apply to

* *Army or Indian*

(1) A. J. R. 1951 P. C. 27

(2) 1951 A. J. R. 30

1951

Supreme Court
Allahabad
Appeal No. 100 of 1950
Criminal,
P

1951

June 5

1485
*Chatterjee v.
 State*

In a case under s. 18 (j) of the Arms Act it was proved that an endorsement (made) with some markings was found on the person of Dhangar, the appellant, when he was arrested. When the investigating agency formed, the charge-sheet in this case is forwarded it to the District Magistrate, Barr Baidya, to check the signature and there is an endorsement on the charge sheet which is as follows:

Provision mentioned, and then there are some marks underneath the endorsement. This charge-sheet was retained at the house of the District Magistrate, Barr Baidya, but elsewhere it was not retained before the trial court.

The second appeal.

Held: (a) that the prosecution of sections under the second part of s. 25 is necessary for a prosecution under s. 19 (j), Arms Act, in the district of Burdha.

(b) that the police cannot be held to be empowered to furnish such a prosecution without the control exercised by the District Magistrate.

(c) that the police charge sheet being a public document can be proved by its production in court and its other part is needed. As the endorsement of the District Magistrate is on the very document judicial notice of it can be taken under the provisions of sections 54 and 57 (5) of the Indian Evidence Act and there is thus a valid admission on the record.

Cause allowed.

Original Appeal No. 839 of 1937 from an order of B. B. Misra, B. Temporary Civil and Sessions Judge of Barr Baidya, dated the 28th September, 1937.

The facts appear in the judgment.

R. C. Sharma for the appellant.

Additional Government Advocate for the State.

MITRA, J.—Dhangar appellant was convicted under section 18(j) of the Arms Act and sentenced to eighteen months rigorous imprisonment by the Additional Sessions Judge Barr Baidya. He and two others were prosecuted under sections 209 and 405, Indian Penal Code, but all the accused were acquitted on that charge.

Dhangar came up on appeal and his appeal came before one of us. The counsel for the appellant contended that the prosecution failed to prove any valid admission for the prosecution of the appellant under section 19(j) of the Arms Act and so the appellant could not have

been convicted under section 19(f) of the Arms Act. He also in a hesitant way criticised the findings of the trial court. So far as the merits of the case are concerned the findings of the trial court are not available. There is enough evidence on the record of the case to prove that an unloaded pistol with some cartridge was found on the person of the appellant when he was arrested. On facts there was no force in this appeal, but in view of a conflict on the point of law raised in the case, this case was referred to a Divisional Bench of this Court.

In order to appreciate the point of law, some facts may be stated. When the investigating agency framed a charge sheet in this case it forwarded it to the District Magistrate, Bareilly, to obtain his sanction and there is an endorsement on his charge sheet which is as follows:

Prosecution unavailing.

and there there are some remarks underneath the endorsement. The charge sheet was endorsed in the court of the Commencing Magistrate but for some unknown reason it was not endorsed before the trial court. The counsel for the appellant contended that under the provisions of section 19 of the Indian Arms Act, no proceedings could have been initiated against the appellants in respect of an offence under section 19 clause (f) of the Indian Arms Act without the previous sanction of the District Magistrate and as this sanction has not been proved and there is also no indication that the remarks underneath the endorsement are those of the District Magistrate, the requirements of law have not been fulfilled and the trial court had no jurisdiction to hear the case against the appellants under section 19(f) of the Indian Arms Act and so the order of conviction passed against the appellants was without jurisdiction and should be held to be null and void.

On behalf of the State it was contended that no sanction was necessary for an offence committed in the Bareilly District and even if it is held that the sanction has not been proved, it will not vitiate the proceedings. Secondly it was contended that if a sanction is

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held to be necessary, such a sanction was obtained in this case from the proper sanctioning authority and it was even entered in the report of the Commencing Magistrate. The failure to exhibit this sanction before the trial court does not amount to sanctioning the proceedings without obtaining the previous sanction of the District Magistrate. Thirdly it was contended that the charge sheet was a public document within the meaning of section 74, sub-clause (3) of the Indian Evidence Act and the court can take judicial notice of this document under section 57 (7) of the same Act.

The following questions arose for determination in this case:

- (1) Was the obtaining of a sanction necessary before instituting proceedings in this case?
- (2) Can the court take judicial notice of this sanction under section 57 (7) of the Indian Evidence Act, even though it was not exhibited before the trial court?

On the first question, I find myself in agreement with the contention advanced by the counsel for the appeal bar. In my opinion a sanction is necessary before a prosecution can be launched under section 19 (5) of the Arms Act. I will cite section 29 of the Indian Arms Act (Act XI of 1879). It runs as follows:

Where an offence punishable under section 15 clause (1), has been committed within three months from the date on which this Act comes into force in any State, district or place to which section 15 clause (2) of Act XXII of 1860 applies at such date, or where such an offence has been committed in any part of India not being such a district, State or place, no proceedings shall be instituted against any person in respect of such offence without the previous sanction of the Magistrate of the district or, in a Presidency town, of the Commissioner of Police.

A reading of section 29 makes it clear that it has made a distinction between those States, districts and places to

which section 35, clause (2) of Act XXI of 1858 applies and in the rest of India. In the case of those States which fall in the first category, the rule of section was to be observed only up to three months from the date on which the Indian Arms Act came into force there. It ceased to operate after that period of time was over.

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I have now to consider whether the district of Bareilly comes under the first part of section 29 or the second part. The counsel for the State has relied on the decision in *Amir Akmal v. Emperor* (1). It was held by DAVENPORT, J., in this case that the sanction of the District Magistrate was not necessary for the presentation of an offender in any district in the North Western Provinces and he included Oudh in those Provinces. Reliance was placed upon a notification issued by the Governor General, dated the 21st of December 1858, extending the provisions of sections 1, 2 and 5 of Act XXVIII of 1857 to the whole of the North Western Provinces. The notification runs as follows:

21st December, 1858. No. 5436. The Right Hon'ble Governor General has been pleased to extend the provisions of sections 1, 2 and 5, Act XXVIII, 1857 to the North Western Provinces of the Bengal Presidency.

His lordship having resolved on classifying such parts of those Provinces as lie to the north of the rivers Jumna and Ganges has further been pleased, under section 24 Act XXVIII 1857, to authorise a general search and seizure of arms by the Magistrates and Collectors within the tract above specified. The Magistrates and Collectors may delegate the same authority to any officer of his establishment, of rank not lower than a Jemadar.

Amir Akmal's case (1) was followed by two Divisional Bench decisions of this Court. These decisions are

King Emperor v. Abdul Ghafour (2)

King Emperor v. Asad (3)

(1) 1859 24 A. L. J. 39.

(2) 1859 27 A. L. J. 38.

(3) 1859 27 A. L. J. 10.

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DALIAN, J., observed in the latter decision that the district of Agra's was an area to which section 32 clause (2) of Act XXIII of 1858 applied. Recently this view was again expressed by a learned Judge of this Court in *Pitram Singh v. The State* (1). These Allahabad decisions, however, can be distinguished, for they do not refer to the districts of Oudh, but relate to those districts which were antequatedly included in the North Western Provinces. The question before us is whether the district of Bareilly is a place to which section 32 (2) of Act XXIII of 1858 applied at the date when the Arms Act (Act XI of 1878) came into force.

Section 32 of Act XXIII of 1858 runs as follows:

Clause 1.—It shall be lawful for the Governor General of India in Council, or for the Executive Government of any Presidency, or for any Local Government, or with the sanction of the Governor General in Council, for the Chief Commissioner, or Commissioner of any Province, district, or place subject to their administration respectively whenever it shall appear necessary for the public safety, to order that any Province, district, or place shall be disarmed.

Clause 2.—In every such Province, district, or place as well as in any Province, district, or place in which an order for a general search for arms has been issued and is still in operation under Act XXVIII of 1857, it shall not be lawful for any person to have in his possession any arms of the description mentioned in section 6 of this Act, or any poisonous caps, sulphur gunpowder, or other munition without a licence.

It is clear from the language of clause 2 that the necessity of procuring a sanction for prosecuting an offence under section 11 (f), Arms Act can only be dispensed with if the district where the offence is committed is one where an order for a general search for arms was made either under Act XXVIII of 1857 and that order continued to be operative, or an order for disarmament of

that district was made under clause 1 of section 12 cited above. So far as the second alternative is concerned, it is recorded by the State that no such order exists. We are thus left only with the first alternative. In my opinion the notification no. 2235 cited above by its terminology does not cover and was not intended to cover the districts in Oudh. It related to only that part of the North Western Provinces which was in the Bengal Presidency, and not to Oudh. It is true that Oudh was also discussed but Oudh was never a part of the Bengal Presidency nor was the dismemberment of Oudh made either under Act XXVIII of 1857 or Act XXXI of 1860. This question has been fully dealt with by a Divisional Bench of the Oudh Chief Court in *Polab Singh v. Emperor* (1). I need not repeat the reasons given by the learned Judges in that case for coming to the conclusion that the districts of Oudh are not covered by the notification no. 2235. *Amer Ahmad's case* (2) was considered but was not followed.

An earlier decision given by *LITTLE, J.* in *Polab Singh v. Emperor* (3) may be taken to be almost conclusive on the point. In that case Polab Singh was prosecuted under section 19(f) Arms Act without the sanction required by section 20 of the said Act. At the preliminary stage of hearing *LITTLE, J.* directed the District Magistrate of Hardoi to report whether the sanction was granted or not. The District Magistrate reported that as the search was conducted on a search warrant issued by him, no further sanction was considered necessary. A paragraph in his report is important and it runs as follows:

It may also be added that so far as Oudh is concerned case under section 19(f) of the Arms Act would seem to be governed by the first portion of section 20 which has ceased to be operative since the expiry of 3 months after the Act of 1878 came into force. In support of this view attention is directed to the Proclamation and orders of the

(1) A. I. R. 1949 Oudh 137. (2) (1924) 24 A. L. J. 10.

(3) Criminal Revision, Application no. 17 of 1932 decided on 14 May 1933.

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Chief Commissioner issued in 1858 and subsequent years for disarmament of Quads, an operation which was still in progress at the end of 1860 and was presumably carried on under the powers conferred successively by Act XXVIII of 1857 and Act XXXI of 1860 as referred to in section 32 (clause 2) of the latter Act.

LORIMER, J., in his decision observed:

The District Magistrate however referred to certain proclamations by reason of which he signs that the case was one in which no question was required that is to say, he has attempted to show that Haidko was a district to which section 32, clause (2) of Act XXXI of 1860 applied at the date when the present Arms Act became law. I give the Government Pleader time to examine into the matter and to find out any notification or proclamation which might assist in determining the question. I can not say that what has been brought to my notice here has made the question clear. There is no doubt that about the year 1858 a general proclamation was issued for the disarmament of Quads. I have read a copy of that proclamation which has been produced before me by the Government Pleader. It does not refer of course to Act XXXI of 1860 as Act of subsequent date nor does it refer to the earlier Arms Act (XXVIII of 1857). It is not clear therefore whether the proclamation purporting to issue under the provisions of any Act then in force and applicable to Quads or whether it was merely a proclamation issued as a matter of executive provision or in connection with the military operations still pending in Quads at the time.

The learned Judge went on and held:

Used it is shown that an order specifically made under the provisions of section 32 clause (1) was promulgated in the Haidko District, I do not think it can be said merely in law that at the time when the present Arms Act (XI of 1878) came into force

section 32 (clause 2) of Act XXXI of 1860 did apply as that case is in the District of Hardoi. After that decision the Government of the United Provinces issued circular letter to all the Deputy Commissioners in Oudh, and issued a direction that no prosecution should be launched under section 19(1), Arms Act without securing a specific sanction. (G. O. no 749/VI-441 of 1915 dated 24th February 1915). If the Government of the United Provinces had felt that notification no 3338 cited above was applicable to Oudh, it would have placed it before the court in a subsequent case and would not have issued the circular letter. It therefore, seems to me that Oudh cannot be included in the North Western Province of the Bengal Presidency as held by DAWDA, J., in *Amir Ahmad's case* (1) and I therefore hold that the procurement of a sanction under the second part of section 39 is necessary for a prosecution under section 19(1), Arms Act, in the district of Oudh.

Even if I had agreed with the view expressed by DAWDA, J., in *Amir Ahmad's case* (1), I would have found it extremely difficult to accept the contention that a prosecution under section 19(1) Arms Act, can be launched without the procurement of the necessary sanction. The rule of sanction is embodied in section 39 Arms Act, consists of two parts. The second part is the general rule and the first part is an exception. While exceptions are to be found in the application of various penal provisions it cannot be disputed that exceptions create a discrimination and as soon as the question of discrimination arises the courts of law have to see whether the discrimination created is based on a reasonable and understandable basis or not. This has become necessary after the enactment of the Constitution of India. In order to understand the significance of a statute it is always profitable to find out its purpose in its historical background.

The Arms Act was enacted in the year 1861 only about 21 years after the Mutiny which is now accepted to be the first concerted effort made by the Indian nationals to shake off foreign domination. The considerable purpose which is quite apparent was to enable

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Indians and to make them incapable of offering any real
threat to the alien rulers. On the pretext of securing
peace and security large areas which had suffered some
resistance earlier were to be completely destroyed. A dis-
tinction was therefore made between those areas which
had proved to be troublesome in the past or where there
were still some groups which were mentally unsettled
and which may become a potential danger in future, and
the other areas which were comparatively more subdued.
These diverse steps were, doubtless, considered necessary
for those areas which fell in the first category. These
areas were to be completely destroyed while a general
sense of awe in the other areas, which were less trouble-
some, was not necessary. The period of grace given to the
areas which were to be destroyed by making a provision
that up to three months after the reinforcement of this
law no action would be necessary was really an inducement
offered to the residents of these areas to surrender
unbattered areas. It was thought that if the possession
of unbattered areas would by itself not make the possessors
liable to criminal prosecution, these possessors might be
tempted to decline their arms and surrender them-
selves as these areas were considered to be disturbed areas.
The amnesty was to be extended only up to a period of
three months. On the other hand, in those parts of the
country which were considered comparatively peaceful
and subdued there was no necessity to offer any inducement
to the residents to surrender unbattered areas. It
was perhaps for this reason that this classification was
made. It therefore, appears that it was primarily the
needs of an alien government to consolidate its sway over
its subjects which prompted this discrimination.
Whether this discrimination should be maintained to-
day or not is another question. This question is not
before us to-day, but I am reduced to the view that on
reasonable basis for construing this discrimination
clause Section 23 of the Indian Arms Act was enacted
before the coming into force of the Constitution of
India and, therefore, the question of equality of treat-
ment was not before the legislature. But when the pass-
ing of the Constitution of India, every law is to be tested

on the basis of the provisions of the Constitution, and if it does not fulfil the requirements of the Constitution, it will have to be held as ultra vires of the Constitution to the extent that it violates the fundamental rights given to the citizens of the country. It is inconceivable at the present day to find any rational basis for the classification made in section 29 of the Indian Arms Act. It cannot be contended with any reason behind it that the districts north of the rivers Jamuna and Ganges are more ravaged than the districts south of these rivers. As the general rule is a statutory rule of law and it is the first part of the section 29 alone which creates an impartial classification, the general rule should prevail and the exception should be ignored.

I therefore find that the first part of section 29 of the Indian Arms Act is hit by Article 14 of the Constitution of India, but it is not necessary for me to decide this question in this case.

There is another aspect which would also indicate that the rule of section 29 is statutory and it must be followed. Section 29 of the Indian Arms Act is not a mere formality and it is a statutory provision against independent prosecution which may not be desirable in the public interest. The legislature by enacting section 29 intended to convey that the prosecution of persons found with unlicensed firearms was a matter of discretion with the district authorities and the act of possessing such fire arms did not by itself make a person liable to criminal prosecution by the police. The reasons for making this safeguard can well be understood. There are certain penal matters in which the legislature makes an objective approach to an offence and there are other offences in which a subjective approach is made. Where the offence is of such an unusual character that its commission by itself amounts to a danger to the community an objective approach is made. Instances of this objective approach are the enactments which broadly speaking come under the head, social legislation, or which are enacted to protect the health or other basic rights of the community at large. In such cases, the plea that an accused did not intend to commit an offence

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and more was said was that it would open to an offender that the possession of unlicensed firearms by itself does not amount to such a danger to the community that a person should necessarily be prosecuted in such a case. It was for this reason that the rule of section 2 was introduced and the District Magistrate was to exercise his discretion after applying his mind to the facts of the case. Some instances may be cited where it would be unquiescent to launch a prosecution merely because an unlicensed arm was found in the possession of an accused. For example, A. had a license for keeping a firearm, but the period for which the license was given had expired for a few days and during that period the police recovered the fire arm from him and sought the sanction of the district authority for prosecuting him. In such a case, if the offender can give a good reason why the license was not renewed in time, the District Magistrate may in his discretion refuse to sanction the prosecution. The offender might explain that for some urgent reason he had to go out of the district or that due to serious illness he was lying in bed and so could not take the necessary steps for the renewal of the license. Such instances can be multiplied. It was for this reason that a discretion was vested in the district authorities to sanction a prosecution. I, therefore, feel that after the passing of the Constitution of India, the power cannot be held to be empowered to launch these prosecutions without the control exercised by the district authorities.

Coming to the next point, I find that this question has been answered by our High Court in several decisions. I agree with the view expressed in these earlier decisions of our High Court. In my opinion a judicial notice of the Statutes can be taken under the provisions of section 57 (7) of the Indian Evidence Act. There are three decisions of our High Court which have held the same view. Two of these are Divisional Bench decisions and one is a decision by a Single Judge. These decisions are, *Queen Ali v. Rao* (7), *State v. Supersawal* (2) and *Geydhan v. The State* (3).

(2) 1954 A. L. J. 194.

(3) 1957 A. L. J. 425. 1956 All. 215.

CHANDRAMANI, J. observed in *Queen A's case* (1)

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I have no hesitation in holding that where the question of proof of sanction by a public officer arises, the production of the original document containing the sanction signed by the public officer is itself sufficient to prove the sanction and no other evidence need be given to prove the sanction. In such a case it would even be sufficient to produce a duly certified copy of the sanction and no further proof need be given. In the present case, therefore, the production of the original sanction of the District Magistrate without further proof was enough to prove the sanction.

The same view was expressed in *State v. Jagmool* (2).
 WILSON, J., observed in it at page 50:

So far as the proof of the sanction is concerned, it is true that no one appeared in the witness box to literally prove the sanction. In this case, however, the sanction appears on the charge sheet submitted by the police. The original sanction is, therefore, available to the court and is a public document. A public document can always be proved by production of certified copies prepared under section 56 Evidence Act as provided in section 77 of the same Act. As the original was produced in court we do not think that any formal proof was necessary.

The next point urged is that the sanctioning authority namely, the District Magistrate, did not apply his mind to the facts of the case as he has simply used *Prosecution unopposed*. There is, however, no form prescribed for recording sanction. Where, therefore, the sanction appears on the original charge sheet which the District Magistrate must have perused before he gave the sanction, the inference may be drawn that the District Magistrate applied his mind to the facts of the case before he ordered prosecution.

The facts of the present case are exactly similar to the facts in *Jagmool's case* (2). I am, therefore, of the opinion

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that as the original charge sheet was placed by the police
issuing agency before the Magistrate, the Magistrate
mailed proceedings after a valid sanction was placed
before him. The sanction to exhibit this sanction
before the trial court would not take away the validity
of the sanction of the proceedings against the appellant.
As regards the absence of proof of the signature of the
District Magistrate, on this sanction, I think that the
case is covered by the provisions of sections 56 and 57 (7)
of the Indian Evidence Act. Here, I observed in
Gardner's case (1) mentioned above as follows:

The last argument advanced on behalf of the
applicant is that there is no evidence to prove the
signature of the District Magistrate. This argument,
also in my opinion, is untenable. Section 56 of
the Evidence Act lays down that no fact of which
the court shall take judicial notice need be proved.
Under section 57 (7) of the Act, a court is bound to
take judicial notice of the names, so-called names,
titles, functions and signatures of the persons filling
for the time being any public office in any State, of
the fact of their appointment to such office as recorded
in any official Gazette. The signature in the present
case purports to be that of a public officer who has
described himself as the District Magistrate.

In this case also the letters D. M. with a signature
which is not decipherable are found at the bottom of the
endorsement. Judicial notice can be taken of this signa-
ture under section 57 (7) of the Indian Evidence Act.
The only question which remains is whether the words
'Prosecution mentioned' can also be held to be proved
in view of the authorities cited above and in view of the
provisions of the Indian Evidence Act which relate to the
proof of public documents. In view of the opinion that no
factual proof of this endorsement is necessary and it can
be held to be proved as an original public document:

A contrary view was expressed in *Supersatowadai
and Kankubharer v. Legal Affairs, Bengal v. Mousam
Mossam* (2). It was held in this case by a Bench of the

(1) 1952 A.L.J. 428.

(2) A.L.J. 362 (Cal. 1950).

Calcutta High Court does where the legislature has provided for a sanction as a condition precedent to a criminal prosecution such sanction must be strictly proved and no prosecution can be entertained unless the necessary sanction has been legally proved. This view was followed by the Madhya Bharat High Court in *State v. Abdul Ghani* (1). There is another decision of the Madhya Bharat High Court which is also on the same lines. It is *Choudhary v. State* (2). The Madhya Bharat decisions did not consider the Allahabad decisions at all and they simply followed the Calcutta view. The Calcutta view was disapproved in *Queen Ali's case* (3), and also in *Gajanan's case* (4) mentioned above. The Calcutta decision did not consider the provisions of the Indian Evidence Act to which reference has been made above in reaching its conclusions. I am, therefore, of the opinion that the police charge sheet being a public document could be proved by its presentation in original and no other proof is needed. As the endorsement of the District Magistrate is on this very document, personal notice of it can be taken under the provisions of sections 36 and 37 (7) of the Indian Evidence Act. There is thus a valid sanction on the record of the case and it cannot be said that the proceedings are vitiated for want of sanction.

1954
Allahabad
High Court
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The last point for consideration is whether the order passed by the District Magistrate is sufficient to infer that the sanction was given when the District Magistrate had applied his mind to the facts of the case. No doubt the order passed by the Magistrate is extremely brief and if it is read separately, it does not indicate that the mind was applied to the facts of the case, but when the material involving the accused is given, it suffices to infer that the document itself which bears the order of sanction, the brevity of the order is not very relevant, for in such a case the material mentioned in the document can safely be deemed to be a part of the sanctioning order. Thus it suffices to meet the requirements of law for it indicates that the relevant facts were placed

(1) A. I. R. 1944 (2) B. 70
(2) 1950 A. I. 7-80

(3) 1950 (2) B. L. R. 420 (4)
(4) 1957 B. L. J. 127

180 before the sanctioning authority and he exercised his
discretion after applying his mind to those facts.

181 Devoted For the reasons given above I find no force in this
182 fact appeal and dismiss it. The appellants are on bail. He
183 Section 3 should surrender forthwith to serve out the sentence.

NOTES: 3—I have had the advantage of reading the judgment of my learned brother. I agree with the conclusion and content in the proposed order. I add this note only because I have not found it possible to agree that the last part of section 59 of the Indian Arms Act is hit by Article 14 of the Constitution. As that portion of section 59 applies only to parts of country which had been generally denuded it might be possible to urge that there was a rational basis for classification inasmuch as because of the general disarmament of those parts no peaceful citizen could be expected to be in possession of any unlawful weapons. This question does not arise in this case and it is not necessary for me to discuss the matter in any greater detail. I however, agree that sentence is necessary for all prosecutions under section 59 (3) of the Indian Arms Act relating to the districts of Arunachal.

As stated earlier I agree with my learned brother that a sanction was necessary and that the sanction having been duly obtained it could be taken notice of under section 57 of the Indian Evidence Act. I concur in the proposed order.

By the Court—Accordingly we see no force in this appeal and dismiss it. The appellants are on bail. He should surrender forthwith to serve out the sentence.

Appeal dismissed

CIVIL MISCELLANEOUS

*Before Mr. Justice V D BHARGAVA and Mr. Justice
MUNDA*

UMA SHANKAR RAI and Others (Petitioners),

v

DIVISIONAL SUPERINTENDENT, NORTHERN
RAILWAY, LUCKNOW and Others (Respondents)

The Common Order filed as Separate Writ Applications—
Scope of

1948

1952 28

Held: that a writ petition can be filed only by one unless the right is joint and inseparable. In the case of a common right it is not open to the persons who are affected by a common order, to file a joint writ application.

Case law discussed.

Civil Miscellaneous Writ no. 58 of 1952

The facts appear in the judgment.

S D Munda for the applicants.

S N Munda for the opposite party.

The judgment of the Court was delivered by—

V D BHARGAVA, J.—This application was referred to a Bench of two judges by one of us on account of the fact that it was a joint application on behalf of four persons. In the opinion of the referring Judge a writ petition could be filed only by one unless their right was joint and inseparable. In case of a common right it is not open to the persons who are affected by a common order to file a joint writ application. Since there was no reported decision of this Court on this matter, and since this matter also arose before the reference to a Bench. There was necessity of referring this case particularly on account of certain remarks made in *Munshid Nath Rai v. Municipal Commissioner of Benares* (1). In the opinion of Mr. Justice Seng in that case it was held that this rule was a highly technical one of procedure and should not be considered in one line

Ferns vs his Extraordinary Legal Remedies (1825 Edition) on the basis of American demands, has played all as follows at page 275

The rule is that persons having a common and joint interest in the subject matter in controversy may be joined as relators while those having separate and distinct rights may not. In case of misjoinder the proceeding will be dismissed, the common law rule being that misjoinder is fatal in all that the writ must be for all or none; that there cannot be one judgment for conspiracy mandamus is issued of some of the relators and another judgment in favour of respondents as to others. Thus is so whatever may be their right to join.

Under the English law also it is not permissible for two or three applicants not having a joint right to join in a writ petition. See *Halsbury's Laws of England* (Madhams's Edition, Vol 9) at page 785, paragraph 1822 where the question has been dealt with in the following words:

Two or more persons cannot join in a single application for a writ of mandamus to enforce separate claims. There must be separate applications for separate writs and that although the several applicants are successors in the office in respect of which the claims arise.

In accordance with the observations made above the petition should be dismissed but as this law is not so far known and some of the writ petitioners have been advised without taking that fact into consideration, we think the applicants may be enabled to make the election. Under the circumstances learned counsel for the petitioners prays that he be given some time to consider the petition and find out from his clients on whose behalf he will press the petition. He is accordingly given a fortnight's time to choose the applicant. Since this case was referred to a Bench on this point, we think were the writ petitioners still can be disposed of by a Single Judge. It need not be tried before a Bench.

Application dismissed

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Date
Signature
Ref
Dr. Joseph
Fleming
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Madhams
Report
Lecture
Sample 1

CIVIL MISCELLANEOUS

Before Mr. Justice Bhargava and Mr. Justice Tandon
ABDUL WAHID RAJI (Petitioner)

VS
Dr. BALKRISHNA VISHUNATH KESKAR
and others (Respondent Parties)

*Parliamentary Elections—Election Petition in—Summary—
Depot of under the fund of account provided by Cen-
tral Government—Whether sufficient compliance with the—
Representation of the People Act 1951 s. 11*

*Summary—Facts—Summary (part of) Government of India Act,
1952 s. 105, Cl. One s. 104 s. 1—Conclusion—Whether and when
available to parties as order based on a disregard of the—
Government of India, 1950 Act 105*

The decision of this Court in *Shankar Prasad Shrivastava v. Election Tribunal*, *Para. 10* (1) viz. of the fund of account provided by the Central Government for the deposit of money for its election petition was correctly shown in a Government Treasury receipt. It is hereby held that the deposit was in terms of the Summary Election Commission within the meaning and requirement of s. 117 of the Representation of the People Act cannot be said to be barred by the evidence led in that case and is therefore of general import and application.

In Ramaraj Mohan v. Raja Thevar (2) cited as

Treasury Rules contained in Vol. I of the compilation of the Treasury Rules published by the Government of India (which form in Part XIX are extracts from the Treasury Rules issued by the Finance Commission) among under s. 117(1) of the Government of India Act, 1952 and have the force of law.

Courts and Tribunals are therefore bound to take due cognizance of these rules and not postpone or delay based on a disregard or an ignorance of the true nature, from a mistaken view apparent on the face of the record and a corrigible through a writ of certiorari.

T. C. Sengupta v. P. Annapur (3) and Mrs. Krishna Ramani v. P. R. Sengupta (4) cited as

Civil Miscellaneous Writ No. 1944 of 1958.

Spital Allowed for the petitioner.

R. S. Pathak for respondent party no. 1.

(S) 1959 J. L. J. 418
(S) 1959 S. C. 418

(S) 1959 S. C. 1106
(S) 1959 S. C. 1106

The judgment of the Court was delivered by—

BEAMAN, J.—Haji Abdul Wahid has filed this petition under Article 226 of the Constitution for the setting aside of a writ of certiorari to quash a decision of the Election Tribunal, Allahabad, dated the 13th of September, 1957 by which the Tribunal dismissed under section 80(7) of the Representation of the People Act an election petition which had been presented by the petitioner, or challenging the election of opposite party no. 1, Dr. Balkrishna Vishwanath Redkar to the House of the People from the Solapur-Nasirabad Constituency, no. 354. The ground on which the Tribunal dismissed the election petition under section 80(7) of the Representation of the People Act, was that the Government Treasury receipt attached to the election petition by the petitioner, when he presented the election petition to the Election Commission, did not show that the sum of Rs.1,000 deposited as security had been deposited in favour of the Secretary, Election Commission. The Tribunal held that the provisions of section 117 of the Representation of the People Act were mandatory and, since the receipt did not have inscribed on it the words in favour of the Secretary, Election Commission, there was non-compliance with the provisions of section 117 of the Representation of the People Act. It is this decision that has been challenged by this writ petition.

When this writ petition came up for hearing before us a very similar point had already been decided by this Court in *Abdurashid Muskhani Sharif v. Election Tribunal, Farrukhabad* (1). It was held in that case that, if the head of account presented by the Central Government for the deposit of security for costs of an election petition was correctly shown as a Government Treasury receipt, it necessarily followed that the deposit was in favour of the Secretary, Election Commission and consequently the entry of the head of account was sufficient to show that the deposit was in favour of the Secretary, Election Commission. Subsequent to that decision by this Court, there has also been a decision by the Supreme Court in

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 (Appellant)
 vs.
 K. Ramaswami Nader
 (Respondent)

K. Ramaswami Nader v. K. Ramaswami Nader and others (1), where the Supreme Court held as follows:

What is of the essence of the provision contained in section 137 is that the petitioner should first ask sharing for the use of the petition, and should enclose along with the petition a Government Treasury receipt showing that a deposit of one thousand rupees has been made by him either in the Government Treasury or in the Reserve Bank of India or at the disposal of the Election Commission and is to be utilised by it in the manner authorised by law and is under its control, and payable on a proper application being made in that behalf to the Election Commission or to any person duly authorised by it to receive the same, be he the Secretary to the Election Commission or any one else.

If, therefore, it can be shown by evidence led before the Election Tribunal that the Government Treasury receipt or the cheque which was obtained by the petitioner and enclosed by him along with his petition presented to the Election Commission was such that the Election Commission could on a necessary application in that behalf be in a position to release the said sum of rupees one thousand for payment of the same to the successful party, it would be sufficient compliance with the requirements of section 137. No such literal compliance with the terms of section 137 is in all necessary as is contended for on behalf of the appellant before us.

From facts, these two documents would show that the order of the Election Tribunal demanding the election petition in the present case was incorrect because the correct head of account was entered in the Government Treasury receipt which was attached to the election petition. Mr Parthab learned counsel for opposite party no. 1 Dr. Kallabesha Velumath Kallabesha, but, however, urged that the decision of this Court in

104 decision which was given in in the case of *Shawmut Building Society* (1).

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Mr. Pothol, has however further contended that even the treasury rules and the government orders concerning the deposits in connection with these elections were not tendered as evidence before the Election Tribunal and should not be taken into account by us when deciding the present writ petition. This argument has not appealed to us. Section 117 of the Representation of the People Act lays down that the deposit is to be made in a Government Treasury and the Government Treasury receipts issued in pursuance of that deposit is to accompany the election petition when it is presented to the Election Commission. This section therefore, recognizes that there are government treasuries which issue receipts after accepting deposits. In order to properly apply that section it is essential that the rules, which govern such deposits in the treasuries, must be taken into account. The question whether those rules are statutory rules or merely departmental rules governing the procedure of the treasuries does not seem to be material. Once the Legislature required the filing of a Government Treasury receipt after making a deposit in a government treasury, the Election Commission and the Election Tribunal, which had to consider whether the receipt was or was not a proper receipt, could only do so after looking at the rules governing the procedure in those treasuries. In fact, even for the purpose of deciding whether a receipt attached to an election petition is a Government Treasury receipt, reference to the rules governing the treasuries will certainly be necessary. It appears to us, therefore, that from the very nature of the provisions contained in section 117 of the Representation of the People Act an inference arises that the rules governing the treasuries have to be looked into by the authorities who have to decide the validity of the deposit.

Again from this, there is the fact that at least the rules which govern the treasuries, have the force of a statute. It appears from the Government of India publications, entitled *Compilation of the Treasury Rules, Volume I*, that the rules contained therein were framed by the Governor General as exercise of the power conferred on

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was by sub-section (1) of section 151 of the Government of India Act, 1935, which was as follows:

151. (1) Rules may be made by the Governor General and by the Governor of a Province for the purpose of securing that all moneys received, on account of the revenues of the Federation or of the Province as the case may be, shall, with such exceptions if any as may be specified in the rules, be paid into the public account of the Federation or of the Province and the rules so made may prescribe or authorize some person or persons, the procedure to be followed in respect of the payment of moneys into the said account, the withdrawal of moneys therefrom, the custody of moneys therein and any other matters connected with or ancillary to the moneys aforesaid.

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The notice to the Government of India publication, remained. Completion of the Treasury Rules, Volume I, recognizes the fact that these treasury rules were framed by the Governor General in exercise of that power. There is a further mention that certain executive instructions relating to currency, currency, coinage and allied subjects which do not fall strictly within the scope of sub-section (1) of section 151 of the Government of India Act, 1935, were also included in the volume but they were contained in Part XIV of that volume. In the present case, the provisions contained in Part XIV of the volume are not required to be referred and accordingly, we need not consider how far those provisions have the force of a statute. There is a further mention in the notice that details of departmental instructions on matters of minor importance or on subjects special or peculiar to the department concerned have been left to be prescribed by the departmental regulations and that formal authorization to prescribe procedure in these matters, or to make exceptions to general rules as specified, have been provided, where necessary, by means of rules included in the Treasury Rules. It is to be noted that in sub-section (1) of section 151 of the Government of India Act, 1935, it was specifically laid down that the

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An error in the decision or determination itself may also be amenable to a writ of 'certiorari' but it must be manifest error apparent on the face of the proceedings, e.g., when it is based on clear ignorance or disregard of the provisions of law. In other words, it is a patent error which can be corrected by certiorari but not a mere wrong decision.

In the present case, not only is the principle laid down by the Supreme Court applicable but that case appears to us to be fully covered by the example given by the Supreme Court. The Supreme Court held that where a decision is based on clear ignorance or disregard of the provisions of law, it would be a manifest error apparent on the face of the record and the decision would be amenable to a writ of certiorari. In the present case the contention of Mr. Parkash that the statutory rules were not examined by the Election Tribunal would mean that the Tribunal gave its decision on clear ignorance of those rules which had the force of law. The example envisages two types of cases. One set of cases would be those where there is disregard of the provisions of law, meaning cases in which the relevant provisions of law are brought to the notice of the court or the tribunal but the court or tribunal disregards them. The other set of cases are those where the decision is based on clear ignorance of the provisions of law which persons can only see when the provisions of law are not brought to the notice of the court or tribunal at all and the court or tribunal also does not for

would discover the relevant provisions of law. The contention of Mr. Pashak that there was no duty cast on the Tribunal to look at the treasury rules and statutes by way of a writ of certiorari when those rules were not brought to the notice of the Tribunal is therefore clearly untenable. Consequently, if the rules were not brought to the notice of the Tribunal, the decision of the Tribunal would have to be held to be one based on clear ignorance of the provisions of law and that would therefore be a fit case for correcting that error by issue of a writ of certiorari on the principle laid down by the Supreme Court in the two cases cited above.

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We may also mention that even on facts we were not quite satisfied that in reality the decision of the Election Tribunal was given in complete ignorance of the treasury rules even though there is no specific mention of those rules in the order dismissing the election petition under section 80 (3) of the Representation of the People Act. In that order there is a reference to another decision given by the Tribunal in Election Petition no. 109 of 1957 (*Mahendra Pal Singh and Shri Jeeva Singh v. Shri Motam Lal Gansam and others*), and the decision in that case was followed by the Tribunal in the present case. It is true that the Tribunal made a reference only to that part of the decision in the earlier case where it had been held that the requirements of section 117 of the Representation of the People Act were of a mandatory character. To us, however, it appeared that as far as the Tribunal, when deciding the present case, relied upon its decision in the earlier case was merely on the question whether section 117 of the Representation of the People Act was of a mandatory character but also on the further point discussed in that case as the basis of which the Tribunal had held that there had been failure to comply with the requirements of section 117 of the Representation of the People Act. In the light of the impressions we quite candidly formed for the persons who had appeared before the Election Tribunal, *Shri Ishai Akmal*, who has appeared for the present petitioner before us had

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also appeared for him before the Election Tribunal. He stated that when the election petition came up for hearing before the Election Tribunal the Tribunal made a remark that it had already heard arguments in *Sri Mohan Lal Gansam's* case and asked *Sri Jyoti Lal Gansam* whether he had anything more to say. *Sri Jyoti Lal Gansam*, who had nothing to add to the arguments that had been advanced in the case of *Sri Mohan Lal Gansam*, thereupon said that he could not say anything at all. The version of *Sri Jyoti Lal Gansam* was borne out by the statement of *Sri R. S. Pathak* who had appeared on behalf of the respondents in the election petition of *Dr. Ashwini Kumar Sinha*. The decision of the Election Tribunal in *Sri Mohan Lal Gansam's* case was reported in the *U. P. Gazette* (Administrative) dated 8th November, 1955 as page 9. It would appear from that judgment that, at the time of deciding that case, the Election Tribunal made a reference not only to the General Government Treasury Rules but also to the *U. P. Financial Handbook*. It is true that, during arguments in the present case, the points which had been raised in the case of *Sri Mohan Lal Gansam*, were not repeated and were not all over again, in the light of the comments made in the order of the Election Tribunal and the submissions made by learned counsel before us. We can only arrive at the finding that all the material which was before the Election Tribunal when dealing with the case of *Sri Mohan Lal Gansam* must also be treated as having been before the Election Tribunal when dealing with the election petition of the present petitioner. This being the position it is clear that the Election Tribunal had before it all the necessary rules and orders issued by or on behalf of the Assistant General of India or the Assistant General of Uttar Pradesh. There is, of course, no mention of the instructions contained in the Government of India Ministry of Finance, letter no. D-480 BI/52, dated 22nd January, 1952 which was also taken into account in the case of *Dr. Ashwini Kumar Sinha* (1), but it appears to us that the issue having been published for public information it should also have been taken into account by the

Tribunal. On these materials the decision of the Election Tribunal was clearly wrong for which we are not giving any further reasons as all of them are already considered in the judgments of this Court in the case of *Shamsher Khan v. Election Tribunal, Farrukhabad* (1) cited above.

Mr. Pathak in opposing the present petition under Article 226 of the Constitution urged one more point which we may deal with. Mr. Pathak made a reference to a decision of this Court in *Mehaga Ram v. Labour Appellate Tribunal of India at Lucknow* (2) to a decision of the Bombay High Court in *Goodwinagar Motor Transport Society v. State of Bombay* (3) and to a decision of the Calcutta High Court in *Master Saye Karam Transport Co., Ltd. v. Secretary, State Transport Authority, West Bengal* (4) in which cases it was held that a High Court will not ordinarily issue a writ of certiorari on the basis of a point which was not taken or urged before the court or tribunal whose order is sought to be interfered by issue of that writ and urged that in the present case since it was not urged before the Election Tribunal that the entry of the correct list of accounts in the inquiry charge was sufficient proof to show that the deposit was in favour of the Secretary Election Commission and was a valid deposit that point should not be allowed to be raised in the present petition and should not be the basis for the issue of a writ of certiorari. It appears to us that this argument completely ignores the reason for which we are interfering with the order of the Election Tribunal. The point whether the deposit was a valid deposit or whether it suffered from the defect that it was not in favour of the Secretary Election Commission was specifically canvassed before the Election Tribunal. That is precisely the point which we are called upon to decide in the present writ petition. Even the statutory rules which had to be referred to were not before the Election Tribunal. Even if they

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(1) 1958 A. L. J. 140.
(2) 10 A. L. J. 194 (Rev. 20).

(3) 17 C. 19 (Rev. 24).
(4) 10 A. L. J. 197 (Rev. 20).

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 No. 1
 On the
 Petition
 of the
 Prisoner
 against
 the
 Sentence

made a manifest error appears on the face of the record in denying the prisoner in complete ignorance of these statutory rules which had the force of law. If the rules are referred to they show that the decision of the Tribunal is clearly and manifestly incorrect. The prisoner has no other alternative remedy except to come up for relief from this Court under Article 226 of the Constitution. In these circumstances this is clearly a fit case where the Court should correct the error committed by the Election Tribunal in exercise of its power under Article 226 of the Constitution.

The result is that the prisoner is allowed and the order of the Election Tribunal dated 13th September 1937 is quashed. The prisoner will be entitled to his costs of this petition which we fix at Rs 100. The result of our order is that the election petition of the prisoner shall be deemed to be still pending and the Election Tribunal shall now proceed to decide it in accordance with the law.

Application allowed.

APPELLATE CRIMINAL

Before Mr. Justice Begg and Mr. Justice F. D. Thompson

LAKSHMI

v

STATE

1938
 Criminal
 Appeal No. 28

Issue.—*That of the charge from criminal responsibility*
—Indian Penal Code (1860) s. 30

The defence of insanity is not available to an accused who is shown to have had a motive for the crime whose conduct not only in the case of his own before and subsequent to the crime, since clearly shows that he appreciated the nature and consequences of his act and who took various steps to achieve his object and escape detection and punishment.

The test of insanity as law does not coincide with that in medical science and s. 30 of the Penal Code covers merely those cases where a person has only del. and is not insane but was

"capable of knowing the nature, consequences or illegality of his act." The respondent does not contend to be a person who is potentially capable of such understanding or judgment, but is precluded from or not in exercising the same.

Admission allowed v. The King (1) disapproved *Atank v. Emperor* (2) disapproved.

Criminal Appeal no. 3012 of 1936 from an order of Ghulam Sahar Sessions Judge at Banda dated the 10th May 1936 in Criminal Sessions Trial no. 6 of 1935.

The facts appear in the judgment.

P. C. Chakravarti for the appellants.

The Deputy Government Advocate for the respondent.

The judgment of the Court was delivered by—

BEA, J. —This is an appeal by one Lakshmi who has been convicted under section 302 Indian Penal Code, and sentenced to imprisonment for life and a fine of Rs 100 in default to undergo further rigorous imprisonment for one year.

The appellant Lakshmi has been found guilty of having murdered her step brother Chanda Lal on the 6th October 1934 at about 8 p.m. in village fishery police station Gauran, district Banda.

The prosecution case is that the appellant was addicted to taking opium and wine. She used to go about making demands for money from her relations. She used to beat her wife and mother. She also used to make similar demands from her deceased Chanda Lal who was opposed to the habit of life of the appellant, and would not accede to her requests to advance or loan money, or enable her to indulge in these vices. It is said that in the month of July preceding the incident, he had beaten his mother and wife. At that time the deceased and other persons had threatened and prevented him from doing so. On the appellant's refusal to obey him, the deceased had threatened him. The appellant had run away after breaking the chains. Five or six days after that Narhan Alur of village Bahari had approached Chanda Lal, deceased, and had told him that when Lakshmi was used to taking opium and wine, why was he not supplying the same to her. Chanda Lal did not

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words to his request rather. Thereafter it is said that Lakshmi appellant had stopped speaking to Ghobis Lal.

The incident itself is said to have taken place on the evening of the 6th of October 1958. The prosecution story is that at about 8 p.m. on the night Ghobis Lal had returned to his house after attending to the call of nature. He was standing at his door on the veranda. At that time the appellants took a phansa and proceeded towards Ghobis Lal. He began to scold. Ghobis Lal with the phansa Ghobis Lal raised an alarm. A number of persons including Durga Chhakum and Datta Bapal the son of Ghobis Lal, reached the spot on hearing the alarm. On the arrival of these persons the appellants fled away outside the village taking the phansa along with them. Ghobis Lal died within an hour or two.

Thereafter Ghobis Lal's son Datta Bapal went to the police station Gurmukh and lodged a first information report there at 1 o'clock on the night. In this report Datta Bapal referred to the fact that the appellants were addicted to taking ganja and bhung. He also stated that he had beaten his mother and wife on the grounds of jealousy, and that his father had tried to stop him from doing this. On his refusal to obey him his father and other persons had tied him up with a chain. He also stated that five or six days after that Nohari Akbar had brought Lakshmi to his father and had asked him to provide ganja and bhung for the appellants as he was used to these means even. His father had refused to supply the same to him. Thereafter Lakshmi appellant had stopped speaking with his father. He then revealed the main facts of the incident and stated that on hearing the alarm he had reached the spot and soon the appellants giving phansa blows to his father. A number of other persons also reached the spot. On being challenged by them the appellants had fled away outside the village with the phansa.

The first information report was lodged in the presence of S. I. Mohammad Akbar, Station Officer, Gurmukh. He

went to the spot and prepared an autopsy report. He got the statements of the witnesses recorded under section 154 Criminal Procedure Code. The reasons given by him for taking this step was that the witnesses being relatives of the appellant, he was apprehensive that they might be coerced with. He also stated that the witnesses were going about with the paroller of the appellant and had colluded with him. He searched for the appellant in the village. The appellant was found absconding and could not be arrested. The appellant surrendered in court on the 8th October, 1954.

The post mortem examination of Chibeti Lal disclosed the following injuries on his body:

- (1) Antero posterior incised wound $3'' \times \frac{1}{4}'' \times$ bone underneath cut, $\frac{3}{4}''$ above left eye brow.
- (2) Oblique incised wound $1'' \times 1\frac{1}{2}'' \times$ bone underneath cut $\frac{1}{2}''$ above eye brow.
- (3) Contused wound $1\frac{1}{2}'' \times \frac{1}{4}'' \times$ bone deep along the left eye brow.
- (4) Transverse incised wound $3\frac{1}{2}'' \times \frac{1}{2}'' \times$ bone deep left cheek beginning from just above the left corner of the mouth running towards the left ear.
- (5) Incised wound $5\frac{1}{2}'' \times 1\frac{1}{4}'' \times$ bone underneath cut $\frac{1}{2}''$ below and parallel to injury no. 4.
- (6) Transverse incised wound $1\frac{1}{2}'' \times \frac{1}{4}'' \times$ bone deep front of left shoulder.

Death in the opinion of the doctor was due to shock and haemorrhage as a result of the injuries sustained by the deceased.

The appellant denied the guilt. He denied that he had run away with the phone after striking Chibeti Lal. He, however, admitted that he used to smoke guns and people used to stop him from doing so and that he was tied up for that reason.

The main facts relating to the assault made on the deceased by the appellant have not been contested before as it formed no part of the case for the appellant. The question, however, which has been strenuously argued by him is that the act of the appellant in murdering Chibeti

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Having heard counsel counsel for the appellant at length, we find ourselves unable to agree with him. In order to determine this question the prosecution evidence may be divided into three categories enumerated below:

- (1) Motive
- (2) Conduct of the appellant immediately before the incident, at the time of the incident and shortly after the incident
- (3) Subsequent conduct of the appellant and his conduct during the trial of the case

1. Evidence relating to Motive

The prosecution case on this aspect of the matter is that the appellant was addicted to games and wine, that he used to make demands for the price from his relatives, that he was once brought by Nohari Ahar to Chikhi Lal for this purpose that an actual demand to that effect was made from Chikhi Lal and that Chikhi Lal had refused to accede to this demand. Thereafter, the appellant had stopped talking to Chikhi Lal. There is a recital of these facts in the first information report which was made shortly after the incident. At the stage of evidence, however, Dela Deyal appears to have been wrong over. He tried to read from the above paragraph. In cross-examination, however, he had to admit that he had stated before the Commencing Magistrate that the appellant quarrelled with his mother for not giving him money for purchasing games and wine, and that his father got him used. He also admitted that in the Commencing Magistrate's court he had stated that the appellant had demanded some from the Chikhi on the Nohari day, that his father had recovered them from giving wine to him. He admitted that these statements were correct. He also stated as follows:

I got all the facts recorded correctly in the first information report, Ex. P 1.

The evidence of Nicholas Akai, (P W 11), is to the effect that he used to make gangs occasionally. He had also stated in the *Constraining Magistrate's* court that the accused occasionally used to make gangs with him. He also stated in the *Constraining Magistrate's* court that he had taken the appellants to Chibidi Lal and had asked him to provide expenses for his gangs. In the *Session Court*, however, Nicholas tried to evade from that statement obviously with a view to help the appellants. However, on being confronted with it, he had no objection to correctness. The said statement was, therefore, brought on record at Ex P 15.

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On the above evidence we are of opinion that the prosecution have succeeded in establishing that the appellants were addicted to gangs and vices, that the appellants used to beat his mother and also his wife, that the deceased Chibidi Lal was opposed to this course of life of the appellants, that Chibidi Lal had refused to give way to his demands of money for these vicious purposes and that the appellants were, therefore, running a game against Chibidi Lal deceased on that score.

2. *Conduct of the appellants just before the incident, at the time of the incident and after the incident.*

On this aspect of the prosecution case there is the evidence of four eye witnesses, namely Lalla (P W 3), Durga Prasad (P W 4) Chhotari (P W 5) and Debi Deyal (P W 6). Before referring to their statements, we may observe at the very outset that a perusal of their evidence shows that there is a general tendency in all these witnesses to help the appellants. This tendency is a distinctly noticeable one and is even found in the evidence of Debi Deyal, the own son of the deceased.

Lalla (P W 3) stated that he reached the spot on hearing the cry of Chibidi Lal. He saw the appellants Lakshmi attacking Chibidi Lal deceased with a pistol. Then Debi Deyal, Durga and Chhotari challenged the appellants to stop. On this he ran away. Chibidi Lal was, therefore, found lying unconscious.

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and the report seemed to show that. It would also indicate that the appellant had succeeded in inflicting grave injuries on those guards. All that is not certainly the conduct of a mad man. The above series of acts culminated in the murder of Chibda Lal, disclose a state of mind in which a person is able to realize the serious nature of the act which he is going to commit, to frame a criminal scheme to achieve his deadly object and, by using intelligence and cleverness, to effectuate his fatal purpose by choosing an appropriate occasion, by selecting a suitable weapon, and by delivering calculated blows backed with force and directed at specific vital spots of the body in such a manner as to bring about death as a certain result of the various deaths. After having committed the murder, the appellant fled away from the scene of his activity. He left the village taking away the blood-stained phirya, which provided a strong evidence against the appellant. This again indicates that the appellant's mental faculties were working at the time so that he was able to realize not only the serious nature of his act but also its criminal error. He did all this with a view to obfuscate all evidence of his crime, to enable him to escape the arms of law and to shield himself.

3. *The conduct of the appellant after the incident and during the trial*

The conduct of the appellant further shows that the same night he had approached one Raja Sharma (F. W. 12) at about midnight and made a request to him that he might be allowed to sleep there. Raja Sharma also tried to help the appellant in this regard. He tried to speak from the above version but when confronted with his previous statement he had to admit the above facts. The appellant had intelligence enough to choose midnight hour for the purpose of concealing himself in the house of a man, where, he thought, he might not be found.

Further, during the long period, beginning from the stage of investigation and enquiry and ending with the stage of trial and appeal, there is nothing to indicate that

the appellant was at any time connected with any fit of insanity. His statement at every stage was such as, according to his own conception, was best calculated to achieve his purpose and to advance his own interests. These statements are both coherent as well as consistent before the Commission Magistrate as well as before the Sessions Court the appellant appears to have a full realization of what was good for his defence. He made a clever statement designed, according to his own way of thinking, to provide him with an escape from the clutches of law. He pleaded not guilty. He denied having gone to Chheda Lal or having made any demand from him. He further denied having assaulted Chheda Lal or having disappeared with the plate from the village or having gone to Raja Bhaga and made any request to him to give him refuge.

An attempt was no-doubt made in the trial court to rely on Ets P 4 and P 5, which are reports of the Superintendents of the Jail Banda, and his statement Ets P 1. These reports evidence that while in jail he had a complete memory of his portraiture, residence and case although he appeared to be indifferent to his surroundings. These reports certainly do not make out a case of judicial insanity as envisaged by section 84, Indian Penal Code. Incidentally it may be mentioned by us that although these reports were relied on on behalf of the appellant in the trial court, his learned counsel argued before us that they were inadmissible and could not be looked into at all. Under the circumstances, it is not necessary for us to refer to them.

To sum up, in the present case there is evidence of motive against the appellant. His conduct prior to the incident as well as at the time of the incident does not support the contention that he was insane at the time when the offence was committed. His conduct subsequent to the incident also does not lend any support to his contention. The conduct history of the appellant in the court of enquiry as well as in the trial court also weighs against the contention that the appellant was liable to recovering his of insanity at short intervals.

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Learned counsel for the appellant has cited two cases to support his contention. The first is *Abderrahman Ahmed v. The King*(1). The facts of this case were that the accused had dreamt that he was commanded by someone in paradise to sacrifice his own son of five years. The next morning the accused took his son to a mosque and killed him by thrusting a knife in his chest. He then went straight to his uncle, but, finding a checkmate nearby, took his uncle to a well, at some distance and clearly told him the story. On these facts a Bench of the Calcutta High Court, then the court of last resort under section 84 Indian Penal Code, was made up. It was held in that case that to enable an accused to get the benefit of section 84 he should be able to establish any one of the following three elements, viz.: (1) that the nature of the act was not known to the accused, or (2) that the act was not known by him to be contrary to law, or (3) that the act was not known by him to be wrong. On the above facts the Bench held that the third element was established by the accused, namely that the accused did not know that the act was wrong. This was obviously on the ground that the accused was labouring under a belief that his dream was a reality. The Bench came to the following conclusion:

That the accused was clearly of unsound mind and that acting under delusion, of his dream, he made this mistake believing it to be right."

We find ourselves unable to endorse this view of section 84 Indian Penal Code, and must, therefore, express our respectful disagreement with it. We are further of opinion that even if this view is accepted to be correct, it will lead to serious consequences. It will be open to an accused in every case to plead that he had dreamt a dream, urging him to do a criminal act, and believing that his dream was a command by a higher authority, he was compelled to do the criminal act, and he was, therefore, protected by section 84. We are of opinion that such a plea would be unacceptable, and would not fall within the

four corners of section 84, Indian Penal Code, which provides as follows

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Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law

The significant word in the above section is "incapable". The fallacy of the above view lies in the fact that it ignores that while section 84 lays down, it says that the accused claiming protection under it should not know an act to be right or wrong but that the accused should be "incapable" of knowing whether the act done by him is right or wrong. The capacity to know a thing is quite different from what a person knows. The former is a potentiality, the latter is the result of it. If a person possesses the former, he cannot be protected as law, what ever might be the result of his potentiality. In other words, what is protected is an inherent or organic weakness, and not a wrong or erroneous belief which might be the result of a perverted potentiality. A person might believe so many things. His beliefs can never protect him once it is found that he possessed the capacity to distinguish between right and wrong. If his potentialities lead him to a wrong conclusion, he takes the risk and law will hold him responsible for the deed which emanated from him. What the law protects is the case of a man in whom the guiding light that enables a man to distinguish between right and wrong and between legality and illegality is completely extinguished. Where such light is found to be still flickering, a man cannot be heard to plead that he should be protected because he was misled by his own misguided intuition or by any forced delusion which had been haunting him and which he mistook to be a reality. Our beliefs are primarily the offspring of the faculty of intuition. On the other hand, the content of our knowledge and our realisation of its nature is born out of the faculties of sensation and reason. If cognition and reason are found to be still alive and glowing, it will not avail a

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man to say that at the crucial moment he had been deluged by an overwhelming cloud of confusion which had been rising in deep and dark shadows over them.

Legal insanity is not the same thing as medical insanity, and a case that falls within the latter category need not necessarily fall within the former. Further, the case where a murderer is struck with an insane delusion is different from the case of a man suffering from organic insanity. In the case cited the plea of the accused would belong to the former class, whereas in the present case the plea of the accused would belong to the latter class. The considerations that arise in the two cases might be different. Meyer, quoting from the Draft Code of 1879, has stated the principle applicable to cases of delusions to be as follows:

A person labouring under specific delusions, but in other respects sane, shall not be acquitted on the ground of insanity, unless the delusions caused him to believe in the existence of some state of things which if it existed, would justify or excuse his act.

The new case cited by learned counsel for the appellant is *Asch v. Superior*(1). This case is easily distinguishable on facts from the present case. This was a case in which a lady named Asch had murdered a boy. In this case there was in her favour the evidence of two experts, one of whom was Civil Surgeon and the other also was a doctor. Both of them had found the accused subject to fits of insanity shortly after the murder. There was also evidence of homicidal insanity in the family of the accused. There was also evidence showing that her grandfather had at some time or other been insane. Further, the facts indicated that the murder was committed without any motive. The above case, therefore, stands on a footing quite different from the present case. In the present case, there is evidence of motive and, as already observed by us, the conduct of the appellant at the time of the incident as well as his antecedent and subsequent conduct both negative the plea of insanity under section 54 of the Indian Penal Code.

(1) 52 B. 201 at 217.

Further: in the present case there is no evidence of any immediate injury. There is also nothing to indicate that the accused was, at any time, overborne by any fit of insanity after the crime. Further, there is no evidence of any expert in his favour. Under the circumstances we fail to see how the above case helps the appellant.

For the above reasons, we are of opinion that there is no substance in this appeal. We, accordingly, dismiss the appeal and maintain the conviction and sentence of the appellant.

Appeal dismissed

APPELLATE CIVIL

*Before the Honourable O. R. Mookherjee, Chief Justice,
and Mr. Justice Dasgupta*

AMAR MATH SINGH

(Appellant)

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v

SUB-DIVISIONAL OFFICER, GYANPUR, and others
(Respondents)

Facts: See *Exemption—Suspension* of candidate for promotion of District Tribunal in division—*Chief Justice Panchayat Raj Act 1907*, ss 5, 5A, 5B, 5 and 15—*Panchayat Raj Rules*, ss 14, 14C, 24 and 25.

The exclusive jurisdiction of the provided authority under s 14A of the Panchayat Raj Act to decide questions of disqualification causes a matter for and shall be confined to state or sessions outside the province of an election petition and there is nothing in the Act or the Rules to exclude from the jurisdiction of the Election Tribunal the determination of that question when it arises in an election petition.

This case of *Munro, J. vs. State of Punjab v. Durrani*, (1) of *Chandigarh*, (2) vs. *Ram Kishan Singh v. Ram Kishan Singh* (3) and *Talwar, J. vs. Anandraman Prasad v. Sub-Divisional Officer, Meerapur* (4) affords

(1) 1907 A. L. J. 121.

(2) Civil App. No. 104 of 1910 decided on 26th January 1911.

(3) Civil App. No. 104 of 1910 decided on 26th January 1911.

(4) Civil App. No. 104 of 1910 decided on 26th January 1911.

148 Special Appeal no. 424 of 1956 from a decision of
Tandon, J. dated 15th March, 1955, in Civil Miscell.
cases Writ no. 2449 of 1955

149 The facts appear in the judgment

150 F. K. F. Chaudhary for the appellants

151 The leading Counsel for the respondents

The judgment of the Court, was delivered by—

152 **MAHADEV C. J.** —This is an appeal against the order
of Mr. Justice Tandon, dated the 15th March, 1955

The appellants and the second respondent were candidates for election to the office of Pradhan of a Gram Sabha. The nomination paper of the second respondent was rejected by the Returning Officer on the ground that she was not due by him in the Gram Sabha where an election and he was therefore disqualified under clause (c) of section 5 A of the U. P. Panchayat Raj Act, 1947. The appellant was accordingly declared to be duly elected. The second respondent then filed a petition under section 22 C of the Act, in which he called in question the election of the appellant on the ground that her, that is, the second respondent's, nomination paper had been improperly rejected and that the result of the election had been materially affected thereby. The election petition was allowed and by an order, dated the 15th June, 1956, the Sub Divisional Officer set aside the election of the appellant and declared a casual vacancy. The appellant then filed a petition in the Court under Article 226 of the Constitution, in which he challenged the validity of that order on the ground, inter alia, that the Sub Divisional Officer had no jurisdiction to decide the question of disqualification which ought, it was contended, to have been referred by him to the prescribed authority under section 5 A of the Act. That petition was dismissed by the learned Judge and the appellant now appeals.

The only question argued before us is with regard to the jurisdiction of the Sub Divisional Officer to decide the question of disqualification.

Section 5 A, of the Act provides that—

If any question arises as to whether a person has become subject to any disqualification mentioned in sections 5, 5 A or 5 B or in sub-section (1) of section 6 the question shall be referred to the prescribed authority for the decision and the decision shall, subject to the result of any appeal as may be prescribed be final and the name of the person shall if necessary be struck off from the register of members.

Section 5 deals with membership of a Gaon Sabha, and section 5 A specifies the disqualifications for holding office under a Gaon Sabha or Nyaya Panchayat. Section 5 B provides that a member of a Gaon Sabha shall not be qualified to be chosen as Pradhan unless he is not less than 30 years of age and infirmities. (1) of section 6 states the circumstances in which a member of a Gaon Sabha shall cease to be a member.

Now the second respondent's election petition was filed under section 12 C, which provides that the election of a person as Pradhan of a Gaon Sabha shall not be called in question except by an application presented to such authority, within such time and in such manner as may be prescribed on one or more of the grounds therein stated. These grounds include the allegation that the result of the election has been materially affected by the improper rejection of any nomination, and it is, therefore, clear that the Tribunal which is the Sub-Divisional Officer has ultimately to decide this issue. It is, however, contended that the Sub-Divisional Officer is obliged, in view of the provisions of section 5 A, to refer that question to the authority prescribed under that section. We are of opinion that this argument is not well founded. The question has come before this Court on three previous occasions. In *Kanti Prasad v. Gouth* (1) *Muzumdar, J.*, held that, notwithstanding the provisions of section 5 A it was within the competence of the Sub-Divisional Officer, when dealing with an election petition, to investigate the question whether a candidate's nomination had been wrongly accepted or not. The same

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the case in accordance either with the Tribunal's opinion or his own opinion on appeal if one has been lodged. My think it impossible to hold that such was the legal case: *impossible*.

Sub-section (4) of section 12 C provides that the author *signifies* is, the Sub-Divisional Officer—before whom the election petition is filed under sub-section (1), shall, on request the hearing of the petition and the procedure to be followed at such hearing have such powers and authority as may be prescribed. These powers are to be found in rule 26 which provides inter alia, that an election petition shall be tried as soon as may be in accordance with the procedure applicable under the Code of Civil Procedure to the trial of suits. No provision is made in this rule, or in any other rule in Chapter 1 F relating to election petitions, for the reference of an issue as to disqualification to the prescribed authority under section 8 A. We are accordingly of opinion that the powers of the Sub-Divisional Officer hearing an election petition and the procedure which he shall follow therein are to be found in section 12 C of the Act and Chapter 1 F of the Rules and that the provisions of section 8 A have no application to such matters.

We accordingly are of opinion that the decision of the learned judge was right and that this appeal must fail. It is accordingly dismissed.

Appeal dismissed.

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Amal Nath
Bose
Law Officer
General
Counsel
Calcutta
1/11/53

CIVIL MISCELLANEOUS

Before the Honourable G. H. Matheson, Chief Justice,
and Mr Justice Dwyer

TRILOK CHAND (Petitioner)

THE ELECTION TRIBUNAL, MEERUT AND
ANOTHER (OPPOSITE PARTIES)

Municipal Elections—Ties called by candidates for members also resolved equal by the finding of the Election Tribunal—Power of the Tribunal to draw and decide by lot—United Provinces Municipalities Act 1948 ss 24 (1) and 25—United Provinces Municipalities (Conduct of Elections of Members) Order, 1951 r 41

In matters relating to the declaration of a duly elected candidate, the jurisdiction of the Election Tribunal under the Municipalities Act is co-extensive with that of the Returning Officer and therefore when the number of votes polled by rival candidates for membership of the Board are resolved equal by the finding of the Tribunal it is competent for the Tribunal itself to draw lots and declare the candidate duly elected as a result of the same.

Ran Pritam Kaur v Ahmed Ishapur (1) *Mano Ram v Bhagwan Kaur* (2) noted on.

Civil Miscellaneous Writ no. 1990 of 1955

The facts appear in the judgment.

S. N. Kacker for the appellant.

S. C. Khare for opposite party no. 2 and Standing Counsel for the State.

The Judgment of the Court was delivered by—

Bhalla, J. —This is a petition under Article 226 of the Constitution.

Trilok Chand, the petitioner, and Shamu Prasad, respondent no. 2, were candidates for election to a seat in Ward no. 2 of the Municipal Board, Hapur. Shamu Prasad was declared elected as he secured 370 votes as against 329 secured by the petitioner.

(1) A.I.R. 1955 O.R. 128. (2) 1954 A.L.J. 40.

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(3) declare another candidate to have been duly elected whichever course appears to be the particular circumstances of the case, the more appropriate, and in either case may award costs as it deems fit.

The contention for the petitioner is that the Election Tribunal can pass such orders only as are contemplated by section 29 of the Act. This need not be disputed. The section provides for the final order which the Election Tribunal has to pass as a result of its enquiry. The question, however, is whether the Election Tribunal can hold on coming to the conclusion that each of the two candidates obtained the same number of votes at the election, that the election of the candidate declared elected was valid or invalid. If it cannot say so, it cannot pass any of the orders contemplated by section 29 as they were finding that each candidate had secured an equal number of votes. It cannot possibly say, if the Returning Officer had found that each candidate had secured the same number of votes, what would have been the result of the Returning Officer's drawing a lot. It follows, therefore, that the enquiry which an Election Tribunal is empowered to make is not complete at the stage of holding that the votes cast for both candidates are equal and the enquiry must proceed further to find which of the two candidates should be given an additional vote for the purpose of determining whether the election of the candidate declared elected was valid or not. This is not done only by the drawing of lots, and on the analogy of the provisions of rule 67 of the U. P. Municipalities (Election of Members) Order 1958 by holding that the candidate on whom the lot falls had secured an additional vote at the election.

In *State of Bihar v. Ramakrishna Prasad Jha* (1) the following observations are to be found at page 268:

Rule 47 (4) is important. It provides that the decision of the Returning Officer as to the validity of a ballot paper . . . shall be final subject to any decision to the contrary given by a Tribunal on the trial of an election petition raising in question

(1) A I R 1963 C 100.

the election. Under the provision the Tribunal is constituted a Court of Appeal against the decision of the Returning Officer, and in such an jurisdiction must be consistent with that of the Returning Officer and cannot extend further.

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the
Provisional
Tribunal
primary
Court.

A provision similar to that of rule 47 (4) is to be found in rule 47 (6) of the U. P. Municipalities (Conduct of Elections of Members) Order, 1930. We hold there fore that the jurisdiction of the Election Tribunal in this case is co-extensive with that of the Returning Officer and that is not the what the Returning Officer could have done if he had found that both candidates had secured the same number of votes. He could therefore draw lots and add a vote to the votes of the candidate on whom the lot fell.

This is exactly what has been held in *Mosses v. Rajagopal Sengh* (1). In repelling the contention that when there is a tie then the Commissioner (the Election Tribunal) cannot have recourse to rule 50 of the Election Rules which authorized the Returning Officer to refer the matter when there is a tie to the District Magistrate, Maun, G. J. observed:

The Commissioner has been given the right to declare another candidate to have been duly elected and for that purpose he can do all that the law provides unless that is something in the nature of the rule to prevent his doing so. Section 26 (2) (b) does not debar the Commissioner from taking such initial steps as may be necessary to declare a candidate to have been duly elected. A Commissioner is not a mere a court of appeal and as a court of appeal he would normally have the same powers as the trial court unless there is something in the Act or in the rules to take away that power.

The observations in paragraph 7 of the Supreme Court judgment in *Jagan Nath v. Jaiswari Singh* (2) do not go against this view. They are simply to the effect that the

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Petitioner
Respondent
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election contest is not an action at law or a suit in equity and that the statutory provisions of the election law must be strictly observed.

It is urged for the petitioner that although rule 48 of the Uttar Pradesh Municipalities (Conduct of Elections of Presidents and Election Petitioners) Order, 1955 lays down that the Election Tribunal is to do if it finds during the trial of an election petition that there is an equality of votes and that the addition of a vote would exclude any of the candidates to be declared elected as President, there is no such provision when an Election Tribunal is dealing with the election petition of a member and that, therefore, the necessary conclusion is that the Election Tribunal concerning the question of the election of a member of a Municipal Board has no such power. We do not agree. The absence of such a provision does not necessarily mean that the Election Tribunal does not have this power.

We are, therefore, of opinion that the Election Tribunal had the power to draw lots when it came to the conclusion that the two rival candidates had secured an equal number of votes in the election.

The other contention is that the Presiding Officer of the Election Tribunal did not himself draw the lots but had the lots drawn by his daughter aged four or five years, and that, therefore, the drawing of the lots was illegal. It may have been irregular but we cannot see on what way the petitioner can have been prejudiced thereby. It appears to be immaterial which person picks out the balls or the pieces of paper which were used for the purpose of drawing the lots.

For the reasons stated above we are not bound in this petition and dismiss it with costs.

Petition dismissed.

APPELLATE CIVIL.

Before Mr. Justice Deyal and Mr. Justice JAMES
SARWAT YAR KHAN (APPELLANTS)

vs
STATE OF UTTAR PRADESH AND ANOTHER.
(RESPONDENTS)

Interim—Application for reference to—Period of limitation, first—Case of action when action—*Interim* Act, 1946 v 59—Indian Limitation Act 1908 Act 161.

Where under the terms of a lease reserving an option, not clear, the lessor has unequivocally the right to terminate the lease and enter into possession subject only to the right of the lessee to recover compensation, the cause of action for the purpose of limitation is an application for reference to arbitrators, not where the lease is terminated but when the parties come to an issue regarding the right to or amount of compensation.

Issue—Whether an application under s. 20 of the Arbitration Act, for reference of a dispute is governed by Act. 161 of the Limitation Act.

The view in the affirmative taken in *L. Jang Nath v. The State of India* (Dean and Rao II) is considered and distinguished by a larger Bench.

See law discussed.

First Appeal From Order no. 381 of 1949, from an order of Anand Prasad Srivastava, (as he then was), District Judge of Kumaon, dated the 18th April, 1949.

The facts appear in the judgment.

Mahesh Ahmad, for the appellant.

The Standing counsel for the respondents.

The judgment of the Court was delivered by—

DAWAT, J. —Sarwat Yar Khan filed an application under section 20 of the Indian Arbitration Act on the 15th of August, 1949, before the District Judge of Kumaon alleging that on the 8th of May, 1949, the Deputy Commissioner, Naini Tal, abruptly cancelled the lease executed by the latter in favour of the appellant on the 7th of July, 1948, and took possession of the land along with the houses built by the appellant and the groves and other

to apply to applications not only under the Code of Civil Procedure but also under the Arbitration Act for which no provision was made elsewhere in the third division of the First Schedule of the Amendment Act and that therefore, an application under section 30 of the Arbitration Act must be made within three years of the date on which the right to make it accrues. The Full Bench case of *Sham Lal v. Dwyer v. Official Liquidator of U. P. Oil Mills Co., Ltd.* (1), observing—

It has been held that in view of the fact that all existing Articles apply to applications made under the Code of Civil Procedure Article 181 also applies to other applications under the same Code, i.e., the application contemplated therein is *typum generis* with the other applications which are specially specified. In this view of the matter even Article 181 would not have applied, and of course, none of the other special Articles would have been applicable.

was not followed in subsequent to the enactment of the Arbitration Act in 1940, two Articles, namely, 185 and 178, had been added in the third division of the First Schedule—the Articles relating to applications made under the Arbitration Act, 1940. Support to the view was obtained from the cases of *Gowen v. Indur v. Firm Kewar Mohi Kimal Kishore (1)* and *Shah v. Co. v. Lohar Singh Kripal Singh & Co. (2)*. The rationale of this division born much of its force in view of the observations of their Lordships of the Supreme Court in *Shi Madhusudan & Co., Ltd. v. Jawahar Mohi Leonard, Salem* (4) the case which does not appear to have been brought to the notice of the learned Judges. It is observed at page 164

It does not appear to us quite convincing without further arguments, that the mere amendments of Articles 154 and 155 can give force after the meaning which as a result of a long series of judicial decisions of the different High Courts in India, came to be attached to the language used in Article 181.

(1) AIR 1944 All 786.

(2) AIR 1950 All 366-372.

(3) AIR 1950 Cal 160.

(4) AIR 1950 B C 95.

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The long names of decisions may well be said to have, as it were, added the words "under the Code" in the first column of that Article. If those words had actually been used in that column, then a subsequent amendment of Articles 188 and 179 certainly would not have affected the meaning of that Article. If however as a result of judicial construction, those words have come to be read into the first column as if those words actually occurred therein, we are not of opinion as at present, advised that the subsequent amendments of Articles 188 and 179 must necessarily and automatically have the effect of altering the long-accepted meaning of Article 181 on this well settled ground, that since the amendment the reason on which the old construction was founded is no longer available.

We are, however, of opinion that it is not essential for the decision of this appeal to decide whether Article 181 of the First Schedule of the Language Act applies to appeals under section 39 of the Arbitration Act. Suffice it to say that if it had been necessary to decide this point, we would have referred this question for decision to a larger Bench, as we are of opinion that the view expressed in the case of *J. Amar Nath v. The Union of India* (1) requires reconsideration both as one of the observations of the Supreme Court and the past history of the non-application of the Language Act to such appeals, both, which are now covered by section 39 of the Arbitration Act.

It is clear from the abridged narration of facts that the dispute between the parties is about the compensation to be paid. A dispute about compensation did not automatically come into existence, on the 15th of May, 1949, when the lease was cancelled and possession over certain land and buildings taken by the respondents. The appellants claimed compensation and it appears, according to the case of the respondents, that the dispute about compensation, concluded on the 15th of September, 1949, when a registered lease was executed

(1) 1951 A. L. J. 11.

in favour of the appellants with respect to certain land given to him in exchange for the land resumed. It is alleged that the appellants agreed to accept the land on exchange. In the circumstances the real dispute about compensation accrued on or after the 19th of September 1853. Any cause of action for filing an application under section 20 of the Arbitration Act would arise on or after the 19th of September 1861. Even if Article 181 of the First Schedule of the Limitation Act applies to such an application, the application presented on the 19th August 1934 was within three years of the accrual of such a cause of action.

It is contended for the respondents on the basis of sub-clause (2) of clause 2 and of clause 3 of the original lease that the right to apply for arbitration accrued as depositors on the 15th of May, 1869, and not on the 19th of September 1853 when a fresh lease with respect to some other land was entered in favour of the appellants. It is clause (6) of clause 3 as so amended.

If during the term of this lease, the Government of the United Provinces requires the demised land or any part thereof for any purpose, the lessee may determine the whole or part of the lease and may take possession of such land or part as the case may be, but in such case the lessee shall be entitled to such compensation as he would obtain were he dispossessed under the law for the time being in force for compulsory acquisition of land by Government under the provisions of the Land Acquisition Act, 1894.

Clause 3 is

The parties hereto agree that every dispute, difference or question which may at any time arise between them or any person claiming under them, touching or arising out of or in respect of this lease or the subject matter thereof, whether during its continuance or after its determination from any cause whatsoever, shall be referred to the arbitration of the Board of Revenue, United Provinces, and its decision shall be final and binding on the parties."

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The Respondents
The Board of Revenue
The Board of Revenue

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The respondents had the right to dispositive the appellants. The appellants do not dispute that right of the respondents. The respondents in their turn do not dispute the right of the appellants to compensation. There is last according to their case, granted him a fresh lease in compensation for the rights he had got under the original lease. The dispute about the quantum of compensation actually arose when the respondents failed to accede to the appellants on the 10th of September, 1951. It is a dispute arising between the parties in respect of the lease or its subject matter which is to be referred to arbitration. The question of compensation or the determination of the compensation was not to be referred unless the parties were at a dispute whether the appellants could be compensated or whether the appellants was entitled to compensation or as to what amount of compensation he was entitled to. The parties really came to differ on the 10th of September, 1951, when they did not agree on the adjustment of the claim of compensation by the same grant of a fresh lease. We are, therefore, of opinion that the contention for the respondents is not correct and the right to apply for referring the matter to arbitration arose on the 10th of September, 1951 and thus, therefore, the application under section 20 of the Arbitration Act was filed in time.

We are, therefore, of opinion that the application under section 20 of the Arbitration Act was filed within limitation.

It is further contended for the appellants that the clerical error found in the decree of the court below as Rs 1,885 should be Rs 750 in view of clause (5) of rule 24, Chapter XXI, General Rules, (Civil), corrected up to the 31st March, 1954, as amended by correction slip, dated the 26th April, 1954, whereby the figure of Rs 750 was substituted for the figure Rs 1,885 in this clause. The contention is correct and the learned counsel for the respondents has nothing to say against it.

We, therefore, allow the appeal with costs, set aside the order of the court below and send the case back to it for further proceedings according to law. We further

direct that the decree prepared by the court below be corrected with respect to the amounts owed for the defendants plaintiffs for the figure 750 be substituted for the figure 108180 and the figure 752 be substituted for the figure 108480 as the total of the costs shown as incurred by the defendants and also for the same figure shown in the operative portion of the decree.

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CIVIL MISCELLANEOUS

*Before the Honourable G. H. Moulton, Chief Justice,
 and Mr. Justice Dwyer*

HORI LAL AND ANOTHER (APPLICANTS)

BOARD OF REVENUE, U. P. AND OTHERS
 (OPPOSITE PARTIES)

*Supreme Court Appeals—Consolidation of for purposes of
 preliminary valuation—Frequency of Code of Civil Procedure
 Act 1908 Or. XLV, r. 4—Consolidation of Order 1908 Art.
 100 (1) (a)*

1930
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Of the six writ petitions arising out of six different suits on the basis of six different issues given in different persons one was dismissed on the 8th October 1929 and the rest were dismissed on the 7th October 1929 by a court order in each case.

This process is concluded by our order dated the 8th October in Civil Misc. Writs no. 2644 of 1929. We therefore report it.

On an application for the consolidation of these suits for the purposes of preliminary valuation in appeal to the Supreme Court under Art. 100 (1) (a) of the Constitution—

Held that the suits started by need to have been decided by the same judgments and were therefore, susceptible of immediate trial.

In suits presenting substantially the same questions for determination Or. XLV, r. 4 of the Code of Civil Procedure permits consolidation if they are decided by the same judgment and forbids consolidation if they are decided by separate judgments and if each such separate judgment, even though identical in terms, be treated as the same judgment; there would be little left of the diversity envisaged in the two portions of the rule.

Shayram Singh v. Shamsa Bai(1) held otherwise and therefore no authority on the point.

Case law dismissed.

(1) A. I. R. 1931 All. 170

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I

Misc. Application under order XLV, rule 4 of the Civil Procedure Code in Supreme Court Appeal no. 257 of 1958

The facts appear in the judgment
S. C. Khosla for the appellants

The Standing Counsel for the opposite Parties

DAVAT, J. —This is an application under Order XLV, rule 4 of the Civil Procedure Code in Supreme Court Appeal no. 257 of 1958.

The facts leading to this application are as follows. One Gadh Bahadur Singh was a owner of several plots of land in village Lakhpur, tehsil Ananya district Bawal. He surrendered his tenancy rights in favour of the zamindar, Bahadur Singh, in 1947. The zamindar then leased out the plots to different persons under various leases. Certain other persons laid claim to the tenancy rights in each land. The result was that the different persons who constituted themselves as tenants claimed rights against the persons claiming tenancy rights in the plots of land leased out to the respective sets of plaintiffs. The trial court decreed the suits. The decrees were maintained on appeal by the district judge. The defendants then filed several appeals before the Board of Revenue. The Board of Revenue held that these thirteen appeals had abated on account of the legal representatives of Bahadur Singh not being brought on the record. The defendants of eight suits filed writ petitions in this Court against the orders of the Board of Revenue. This Court allowed these petitions and quashed the orders of the Board of Revenue that the several appeals had abated. On the rehearing of the several appeals the Board of Revenue allowed six of them holding the defendants appellants in these several appeals to have acquired the right of admission on the basis of their being recorded occupants in the village papers of 1948 P. The plaintiffs of these six suits then filed up writ petitions in this Court. They were numbered Civil Misc. Writ petitions nos. 2663, 2664, 2665, 2666, 2667 and 2668 of 1958.

This Court dismissed Civil Misc. Writ no 2664 of 1958 on the 24th of October 1958. The other five writ petitions were dismissed on the 7th of October 1958 by the same order. This petition is consolidated by our order dated the 6th October last in Civil Misc. Writ no 2664 of 1958. We, therefore, reject it.

The petitioners of the six petitions have filed Supreme Court Appeals nos 257, 258, 259, 260, 261 and 262 of 1958 for leave to appeal to the Supreme Court under Article 133 (1) of the Constitution. Supreme Court Appeal no 257 of 1958 is by Hori Lal and Geeta Ram the petitioners in Civil Misc. Writ no 2668 of 1958. Paragraph 15 of each of these Supreme Court Appeals is identical except for the omission of the number of the writ petition relating to that particular Supreme Court Appeal. Paragraph 15 of the Supreme Court Appeal no 257 of 1958 is

That there were six consolidated writ petitions nos 2663, 2664, 2665, 2666 and 2667 of 1958, arising out of the concerned writs in which applications for leave to appeal to the Supreme Court are being filed and they together involve the properties in dispute of value more than Rs 20,000 and are thus entitled to a certificate of being fit for leave to appeal to the Supreme Court of India on that ground.

It is contended for these applicants for leave to appeal to the Supreme Court that the value of the subject matter of each writ petition was less than Rs 20,000 and that, therefore, none of the applicants is entitled to a certificate under Article 133 (1) (a) or (b) of the Constitution. What is contended on their behalf is that they are entitled to this certificate if for pecuniary purposes the writ petitions are consolidated, in which case the value of the subject matter involved in the six appeals will exceed Rs 20,000. The present application under Order XLV rule 4 of the Civil Procedure Code is for the consolidation of the six Supreme Court Appeals for the purpose of pecuniary valuation. The application is opposed both on the ground that the consolidation is not possible under Order XLV, rule 4,

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Civil Procedure Code, and on the ground that even on consolidation the value of the subject matter of the six writ petitions will not exceed Rs 20,000. We have not been the learned counsel for the parties on the question of actual valuation in case the writ petitions are amended, as we are of opinion that the contention for the respondents is correct and these petitions cannot be consolidated.

Rule 4 Order XLV of the Civil Procedure Code reads thus:

For the purposes of summary valuation cases involving substantially the same questions for determination and decided by the same judgment may be consolidated, but cases decided by separate judgments shall not be consolidated notwithstanding that they involve substantially the same questions for determination.

The six writ petitions were not decided by the same judgment. Writ Petition no 2664 of 1958 was decided on the 6th of October, 1958. This judgment did not decide any other writ petitions. The other five writ petitions were decided by five separate orders, though entered in terms in view of the decision in Writ Petition no 2664 of 1958 as the points of law urged for getting the quashing of the orders of the Board of Revenue were common. It is not possible, therefore, to hold that the six writ petitions were decided by the same judgment and it follows that these writ petitions cannot be ordered to be consolidated under Order XLV, rule 4, Civil Procedure Code.

It is contended for the applicants that the writ petitions can be said to be decided by the same judgment, as the judgments in the other five writ petitions adopted the judgments in Writ Petition no 2664 of 1958. This too is not a correct version. The judgments in Writ Petition no 2664 of 1958 was not adopted in the other writ petitions. The judgments in the other writ petitions followed what had been laid down in the earlier judgment in Writ petition no 2664 of 1958. This is done every day. Previous rulings are relied upon for

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can fulfill the requirements of section 139, C. P. C., read with Order 45, rule 4, as regards the nature and value of the subject matter of the case.

There was no discussion as to how the case came within the provisions of Order XLV, rule 4. It does not appear from the reported judgment whether the results had been decided by that Court by one judgment or by two judgments. This case therefore cannot be taken to be an authority against the view expressed by me.

In *Pekin Roadway v. Republic of China* (1) objection was taken before the Privy Council to the certificate granted by the High Court to three persons to appeal to His Majesty in Council. The suit out of which those appeals arose was instituted against 18 defendants and was for the setting aside of a power of attorney and 14 rule deeds. The trial court cancelled the orders. Only three of the vendors desired to appeal to the Privy Council and obtained the necessary certificate from the High Court. In dealing with the objection to the propriety of the certificate granted by the High Court, their Lordships of the Judicial Committee said at p. 18:

This was not the case of an appeal involving several appellants each of whom could or was said to dispute at some distance or unrelated case of action, and it is unnecessary to consider the applicability of section 139 to appeals of that kind. Here the case of the respondents against each appellant and of each appellant against the respondents depended, in its substance, on the same facts of the evidence as a whole and turned on the same issue regarding the capacity of *Somabandara*. On the facts of this appeal there was indeed but one matter in dispute unless the mere circumstance of a plurality of appellants decides otherwise. On the true construction of the section their Lordships

were unable to see any ground for such a relief and they therefore, overruled the preliminary objections.

The two petitions before us involved different persons different respondents different land different issues granted in favour of the petitioners and different errors in the village papers in favour of the different respondents. The cases of women in each suit was different. The Privy Council did not decide that cases like the present two petitions could not be consolidated, but the observations of their Lordships of the Judicial Committee make it clear that such cases are of a different kind from the cases which could be consolidated.

The cases relied on for the appellants are *Jangam Gura Chamlager v. Gajanan Narayan Patkar* (1), *Pita Netha Brohadhar Manoharwar Prasad Bhojhar Zamindar Gura v. Secretary of State* (2), *Molaga Lalakishwar Ambharayala v. Maratta Rajawade* (3) and *Kashid Nandlal v. Pahal Nagayya* (4).

In *Jangam Gura Chamlager v. Gajanan Narayan Patkar* (1) the admissibility of a document giving an option of repurchase was decided against the plaintiff who had brought two suits, one on the basis of the document executed in his own favour and the other on the basis of his being an heir of the person in whose favour a similar document had been executed. The trial court dismissed one suit on the ground that the document was inadmissible and the other suit on the ground that the plaintiff had failed to prove his heirship. On appeal the High Court held both the documents to be inadmissible and did not decide the question of heirship in one of the suits. The appellants for leave to appeal to the Privy Council were consolidated, as the evidence in both the suits was taken in one suit and the parties agreed to treat that evidence as evidence in the other suit as well. The trial court referred to its findings in one suit in its judgment in the other suit. The question of heirship was

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(1) A. I. R. 1937 Bom. 39.
(2) A. I. R. 1935 Mad. 122.

(3) A. I. R. 1940 Mad. 739.
(4) A. I. R. 1936 Nag. 375.

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not to be argued before the Privy Council. It was held in these circumstances that the suits had been decided by the same judgment within the meaning of rule 4, Order XLV, Civil Procedure Code and it was observed at p. 28

As far as the question that will arise in the proposed appeal is concerned, it is quite clear that it was dealt with by each court in one judgment, and that the judgment in the other suit and the cases pending appeal, merely refers to that other judgment and, adopting the reasons there given, passes a decree accordingly.

It may be mentioned that the question in dispute was considered to be of general importance and the case a fit one for appeal to His Majesty in Council. It is to be noted that the point in dispute between the parties was decided by one judgment and was not separately decided in the different appeals. In the case before us one judgment delivered a day earlier was used as an authority for deciding the same legal question in the same way and thus for disposing of the appeal in the same manner. In these circumstances it cannot be said that the later appeals were decided by the same judgments by which we decided the first appeal. It is could be possible to say so in the case of appeals decided in different cases on the authority of an earlier decision consideration would be logically possible under rule 4, Order XLV, Civil Procedure Code, though on the face of it it would appear not.

In the two Madras cases referred to above the High Court had decided several appeals by the same judgments and ordered the consolidation of the suits for purposes of valuation under rule 3, Order 45, Civil Procedure Code. In the earlier Madras case the High Court observed at p. 126

It is matter of this kind we think we should look to the spirit of the rule and not the letter. This is the view taken by the learned Judges of the Bombay High Court in *Jungar v. Gopalan Narayan* (1) 1

think that the judgments of the lower court must be regarded as the same judgments and, therefore, the objection of the learned Government Pleader is disallowed. We are prepared to consolidate the value of the suits if it is of any use to the petitioners.

With respect, we are of opinion that the identity of two separate judgments will not make them one and the same.

In the later Madras case (1) the High Court decided various Letters Patent Appeals by a common judgment. In fact there was a common judgment in the second appeals and in the first appeals to the Subordinate Judges' court. In the trial court the suits were tried together and evidence was adduced only in one of the suits as evidence common to all the suits. The trial court delivered the judgment in the suit in which evidence was recorded and incorporated relevant extracts of the findings from that judgment in the judgments of the other suits. In these circumstances it was observed:

In substance, however, it must be considered that the suits were all decided by the same judgment, and the observations in the former Madras case (2) were approved.

In *Kishanlal Nandlal v. Pahal Nagayya* (3) four petitions under Article 133 of the Constitution read with sections 109 and 114, Civil Procedure Code, for leave to appeal to the Supreme Court were consolidated. The four appeals had been decided by four different judgments. It was observed during the course of the judgment:

Though cases are to be found in the common texts supporting the opposite contention, the trend of opinion now seems to be that if the judgments are substantially the same consolidation can be ordered.

No reference to any decided case has been made in this connection. The only cases which have been referred to as being relevant to the question under discussion are the three cases just now dealt with.

(1) A. I. R. 1948 Mad 176.

(2) A. I. R. 1942 Mad 128.

(3) A. I. R. 1950 Mad 274.

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1. **Project Name:** [Project Name]
 2. **Project Manager:** [Project Manager]
 3. **Project Sponsor:** [Project Sponsor]
 4. **Project Start Date:** [Project Start Date]
 5. **Project End Date:** [Project End Date]
 6. **Project Budget:** [Project Budget]
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Use of the term "disability"

In our opinion, this latter result is in accordance with the grammatical meaning of the rule. The deletion of the word *judgment* in subsection (b) of section 2 of the Code of Civil Procedure was substituted in rule 4, Order XLV, Code of Procedure, and the same judgment was taken to mean some statement given by the judge of the grounds of a decree or order. It was then observed:

When a judge writes a single statement of the grounds and makes those grounds applicable to different domains, it is, in our opinion, the same judgment for the purposes of R. 4 of O. 43 of the

Even according to the interpretation only those separate judgments would be deemed to be the same judgments when the reasons for the decision are mentioned in one judgment and the other judgments refer to those reasons and thereby make those reasons part of themselves. The interpretation will not apply to those judgments of the High Court where the judgments delivered in one case is taken as an authority for deciding the other case—of course, when the points for determination are just questions of law. I may say with respect, that the definition of the word judgments in sub-section (3) of section 2 is to be applied for interpreting that word in the Code when there be nothing repugnant in the subject or context and it appears to us that to call separate judgments delivered at different times as the same judgment:—if the materials of one decision is the same as of the other—does not appear to be consistent with the provisions of the two portions of rule 4, Order 45 Civil Procedure Code. If separate judgments dealing with substantially the same questions will have to be considered as the 'same judgments' there will be little left of distinction in the two portions of the rule.

For the reasons stated above, I am of opinion that there are two persons, making out an *different* claim on the basis of an *different* basis given in *different* papers and that claims by an *different* set of persons, with respect

25 different holdings decided by 25 different judgments, cannot be said to have been decided by the same judgments and cannot, therefore, be consolidated for the purpose of valuation under rule 4 Order 45 Civil Procedure Code. I would therefore reject this application.

MORRISON, C. J.—I have had the advantage of reading the judgment prepared by my brother and agree substantially for the reasons stated by him that this application must be dismissed. I should have been prepared to give a liberal construction to the provisions of Order XLV rule 4 were it not for the concluding words of that rule:—but were decided by separate judgments shall not be consolidated, notwithstanding that they involve substantially the same question for determination. The use of those words seems to me to show that it was the intention of the legislature in enacting rule 4 that only those cases which are decided by the same, that is by one judgment should be capable of consolidation.

By the Court—The application is rejected.

Application rejected.

APPELLATE CRIMINAL

*Before Mr Justice Mulla and Mr Justice Mulla**
BARU LAL.

STATE

Ground Trial—Murder—Plaintiff suing the deceased—Fits entry with the wife—Gross and sudden provocation—Criminal—Discharge—Indian Evidence Act, 1872 s. 106 scope of Indian Penal Code, 1860 s. 300 Explanation 1, 302 and 304 scope of

It was proved that Ram Nath deceased was killed by the accused appellant as the last in the Government House on 14th at 4.30 p.m. on 11th January 1936 and it was contended that the appellant committed this crime when he had completely lost his self-control and his case fell under s. 304 Indian Penal Code and not s. 302.

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The prosecution alleged that the deceased had come to the city of the appellant in his absence even though the deceased had married in other respects that he earned an income necessary with his wife and had gone even to the extent of changing the surname of the deceased. Paragraph in this fact. The appellant was also stating words that he was causing injuries to the deceased because in his opinion, the same was having an impact with his wife.

Held, that where a dispute arises from the evidence led in the case whether produced by the prosecution or the defence that an Exception would be applicable, the presumption against the accused is removed and the case placed upon him is changed and the court must consider whether the case of the accused is proved by the Exception or not irrespective of the exact facts or the plea advanced by him. In fact on consideration of the entire evidence the court is left in doubt, the facts of the Exception cannot be deemed to be proved.

Held, further, that where the prosecution case itself indicates that an Exception is applicable in favour of the accused the accused cannot be denied the benefit of that Exception whether he pleads it or not.

Mangal Gada v. Emperor (1) *Kali Churn Mondal v. the Emperor* (2) *Emperor v. Rajat Prasad* (3) *Kali v. Emperor* (4) cited as *Queen-Emperor v. Terrel* (5) distinguished.

Where the husband is living in a hotel's garden and finds that the dress ordinary which might have existed earlier had ceased to exist because of the changed place of residence in other circumstances and then suddenly he finds that he was murdered in his hotel and the tragedy was continued all the time, this would amount to a sudden knowledge which would come to a shock to him and the circumstances established in this case proved that the accused when he killed the deceased had been in self-control because of a grave and sudden provocation and his conduct is protected by Exception I to section 300 Indian Penal Code and his offence falls under Section 304 Indian Penal Code and he can be sentenced only under that Section.

Criminal Appeal no. 541 of 1958 from an order of B. M. Chaudhri Sessions Judge, Lucknow, dated 27th August, 1958.

The facts appear in the judgment.

Mahomed Ali Beg for the appellant.

Refutation, taking brief for the Additional

(1) A. I. R. 1952 P.W. 37. (2) AIR 11, Cal. 2, P. 122.
(3) 1958 L. R. 10, A.I. 43. (4) A. I. R. 1958 Cal. 440.
(5) 1958 L. R. 10, A.I. 122.

Government Advocate, for the State

The judgment of the Court was delivered by—

MULLA, J.—Lala Lal appellant has been convicted under section 302 Indian Penal Code, and sentenced to imprisonment for life by the Session Judge Lucknow. The charge against the appellant was that on the 11th of January 1938 at about 4.30 p.m. he along with his servant Lala Ramak the deceased Ramnath with a wife and the mistress of Lala Ram and then committed an offence under section 302/34 Indian Penal Code. The trial court did not frame the charge properly for an offence where section 34, Indian Penal Code is applied the court should clearly mention that the crime was committed in furtherance of a common intention. This fact was not mentioned in the charge framed by the trial court. The trial court acquitted Lala and gave him the benefit of doubt and convicted the appellant under section 302 Indian Penal Code, complainant.

As we are examining the trial court, we may at this very stage observe that we have not been impressed by the reasoning of the trial court when it conspicuously acquitted Lala the other accused. The reasoning adopted by the trial court cannot bear scrutiny and good evidence has been ignored on lawful grounds. The medical evidence alone is sufficient on the point that two persons at least committed this crime and put the trial court by fallacious reasoning come to the conclusion that the bruises and the abrasions on the person of the deceased could have been caused in grappling alone. We fail to understand how a large disfigurement on the face could have been caused by friction alone. It is reasonable that one assailant used a blunt weapon and then put it down and picked up a sharp edged weapon. We, therefore, have no doubts in our minds that the convincing evidence of two eye witnesses together with the medical evidence was ignored by the trial court and on faulty reasoning it gave the benefit of doubt to Lala accused. This, however, in our opinion has not caused a grave miscarriage of justice because we are satisfied in the view that Lala did not share the intention of the appellant and he could have been held responsible only

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Before us the counsel for the appellant has not contended that the appellant was not responsible for the death of Ramnath deceased. As a matter of fact, it was not possible to advance that contention. We, however, need not mention those facts which conclusively establish that Ramnath deceased was killed as the last in the Government House orchard at 4.30 p.m. on the 11th of January, 1955. There is overwhelming evidence to prove this fact but in the counsel for the appellant has not challenged the findings of fact reached by the trial court. It is not necessary to mention those facts. He has advanced only one contention before us, namely, that the appellant committed this crime when he had completely lost his self-control and, therefore, his case falls under section 304 Indian Penal Code, and not section 302, Indian Penal Code.

In deciding the question of law placed before us, there are two subsidiary questions which should be decided first. These subsidiary questions are:

- (1) Can the benefit of an exception be given to an accused person although he does not plead it?
- (2) Do the facts proved in the case establish that the appellant received a grave and sudden provocation when he committed this crime?

We will deal with the first question now. No case law was placed before us either by the counsel for the appellant or by the counsel for the State. We are, therefore, deciding this question on our own interpretation of the law and some decisions on which we could place our hands. In our opinion the onus of establishing an exception shifts to the accused when he pleads an exception. Section 302 of the Indian Evidence Act is clear on this point. We have now to see how this onus can be discharged by the appellant and to what extent this onus is placed upon him. In our opinion this onus can be discharged in two ways. In the first place, it can be discharged by affirmatively establishing the plea taken up by an accused person. In the second place it can also be discharged by showing such circumstances which would create a doubt in the mind of the court that the reasonable possibility of the accused acting within the protection of the exception pleaded is not eliminated.

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that Shreeji Kumbhkar was willing to speak the truth. The same thing is maintainable in the statement of Meena Kumbhar, also. For some reason the defence instead of accepting the allegations contained in the prosecution case preferred to take up the stand that there was no reference in these allegations and even the case was not contained in the record. The trial court made no mistake when it accepted the evidence of the two eye witnesses, Jaiji Ahmed and Takshi, and rejected the statements of Shreeji Kumbhkar and Meena Kumbhar. We are therefore of the opinion that where the prosecution case itself admits that an exception is applicable in favour of the accused in the circumstances of the case, the accused cannot be denied the benefit of that exception whether he pleads it or not. In such a case the charge framed against the accused comes in conflict with the prosecution evidence itself.

The rule of law that would be applicable to this case is laid down in *Mangal Chaudh v. Emperor* (1). In this case the learned Judge found that the offence seemed to have been committed under a grave and sudden provocation but since the accused did not raise this plea, he could not raise it and sustained the accused under section 302 Indian Penal Code. The learned Judge observed:

This is obviously wrong. Section 103 of the Evidence Act says nothing about plea but places the burden of proof in certain circumstances on an accused person. But if the prosecution has already performed that task for him, it is clearly not necessary for him or anybody else to do it all over again. For a court to say that a fact is not proved, simply, after considering the matter before it is manifestly belated to say so or exclude itself and to go into the question of evidence under and the defence law of proof in section 103 of the Evidence Act.

This view is also supported by the observations in *The matter of Ksh. Chaita Mahapatra* (2), which is a Bench decision of the Calcutta High Court. A contrary view was taken in *Queen-Emperor v. Tinsawal* (3), but this

(1) A. I. R. 1962 Nag. 27. (2) 1988 Cr. C. 10. A. R. 122.
(3) 1988 Cr. C. 10. A. R. 122.

was again modified to a certain extent in *Empress v. Wajid Hussain* (1). In *Wajid Hussain* I was the learned Judge observed:

"While we agree with what was laid down in *Queen Empress v. Tinnal* (2), we also hold that circumstances which would bring the case of an accused person within any of the general exceptions in the Indian Penal Code may and may be proved from the evidence given for the prosecution or to be found elsewhere in the record but there must be evidence upon which such circumstances can be found to exist."

It therefore appears that where there are circumstances proved in the case whether by the prosecution or the defence to make an exception applicable, it is immaterial from which side that evidence is placed on the record, and the benefit of those circumstances cannot be denied to an accused on the ground that he did not plead the exception.

In another Calcutta case *Kish v. Emperor* (3) it was held that where it was clear from the cross examination that an exception was being pleaded but the accused him self did not do so, it amounted to a misdirection to the Jury when the trial court asked them not to consider that plea, as it was not the plea of the accused. In that case also the counsel for the appellant was all the time pleading an exception and the trial court erred when it did not consider that plea. The law does not prevent an accused from taking even an alternative plea and the court cannot confine its attention to the plea advanced by the accused himself and ignore the other plea which is manifest from the cross examination even though it is fully made out on the evidence. No doubt in such a case the plea assumes the aspect of an argument but it must prevail if it is supported by evidence. We are therefore, satisfied that the first question framed by us must be answered in favour of the appellant.

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(1) 1949, 1 L. R. 33, 40, 41. (2) 1947, 2 L. R. 21, 42, 43.
(3) 4 C.R. 1949-50, 662.

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It will now take up the second question and discuss the facts proved in the case.

We find that the prosecution came forward with the allegation that an illicit intimacy was maintained by the appellant, between his wife and the deceased. It further adduced evidence to prove that the appellant went to Knapar and held a Panchayat there. It further proved that the appellant shifted from Nalabangay to the Government House ordered and, therefore, the deceased could not have had any reason to come to the house of the appellant. We have mentioned above that the deceased was no relative of Shraman Kamlu. He was a maternal cousin of the appellant and if the appellant did not want that he should come to his house, he had no business to go there. Lastly it has proved that at the time of the commission of the crime the appellant was visiting the deceased with the illicit intimacy which he was carrying on with his wife. The only fact which is wanting is that the prosecution did not adduce specifically that there was actually illicit intimacy between the deceased and Shraman Kamlu. In our opinion the circumstances mentioned above cannot leave any doubt in any reasonable mind that the persistence of the deceased in coming to the house of the appellant, even in his absence could have been due to no other reason but because he was carrying on an intrigue with Shraman Kamlu. The appellant did not take any direct action against the deceased in the beginning. He first tried to get rid of his wife and then he shifted his place of residence, yet the deceased kept on visiting his house in his absence. These circumstances lead only to one conclusion, namely, that the deceased was having an illicit intimacy with Shraman Kamlu. The denial of Shraman Kamlu or even the denial of the appellant himself cannot take away the evidentiary value of these circumstances.

We have now to consider whether the circumstances proved amount to a grave and sudden provocation, or not. There are innumerable cases where it has been held that where the husband surprises his wife in a compromising position with another man, it amounts to a grave

and sudden provocation. In other words, where knowledge that his wife is unfaithful to him comes all of a sudden to the husband, it is considered likely that he may lose his self control and act in a wild manner. The question arises whether in the absence of actually seeing one's wife in a compromising position, the sudden appearance of a lover would amount to a sudden provocation or not. In our opinion this would depend upon the background and the circumstances of the case. The facts in *Chan's* lay down that only an ocular proof can bring a conviction of illicit intimacy. If from the circumstances can be interpreted only in one way by any reasonable person, the mental posture which will form in the mind of the husband by what he saw would be just as potent and powerful to disturb his mental balance and make him lose his self control as the corroboration itself. In *Deary v. Empress* (1) the accused found his wife seated on the same car with a man whom he had expelled from his house only a day previously and losing his self control, he killed her. It was held that he must be considered to have received a grave and sudden provocation. We do not see any difference between finding the lover inside the house and finding him seated on the same car. Both these circumstances in the background of other facts were sufficient to convince the court that the husband about the infidelity of his wife and provoked him to an ungovernable rage. The subsequent act of killing was, therefore, not the outcome of any brutal and diabolical malignity but a consequence of human frailty to which all are liable.

Where the husband is living in a fool's paradise and thinks that the illicit intimacy which might have existed earlier had ceased to exist because of the changed place of residence or other circumstances and then suddenly he finds that he was mistaken in his belief and that intimacy was continuing all the time then in our opinion would amount to a sudden knowledge which would come as a shock to him. The appellant when he came to reside in the Government House realised, felt that he had removed his wife from the influence of the deceased and

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There was no actual any contact between them. He had killed himself with a false security. This belief was shattered when he found the deceased at his feet when he was alone. This would certainly give him a mental jolt and as this knowledge will come all of a sudden, it should be deemed to have given him a grave and sudden provocation. The fact that he had discovered this after some time on an earlier occasion also will not alter the nature of the provocation and make it any the less sudden. We therefore accept the contention advanced by the counsel for the defence that the circumstances establish ed in this case prove that the appellant when he killed the deceased had lost his self control because of a grave and sudden provocation.

For the reasons given above, we think that an offence under section 302 Indian Penal Code is not made out against the appellant. His conduct is protected by Exception I to section 300 Indian Penal Code. His offence falls under section 304, Indian Penal Code, and he can be convicted only under this section.

It is to be determined now as to what sentence should be imposed upon the appellant under section 304 Indian Penal Code. We feel that the appellant was really a victim of circumstances and his own fault was only to the extent that he could not control himself better and he became steadily wild. The deceased pursued the wife of the appellant even to the Government House refused and in spite of the earlier displeasure clearly exhibited by the appellant, the deceased did not mind continuing the intimacy. He came steadily at a time he thought the appellant would be away. Suman Kumari was obviously equally guilty for without her encouragement and active co-operation this outrage could not have commenced. We are, therefore, inclined to take a lenient view of the crime committed by the appellant. It was against a sentence of five years rigorous imprisonment would meet the ends of justice in this case. The appellant is acquitted under section 302 Indian Penal Code but convicted under section 304 Indian Penal Code and sentenced to five years rigorous imprisonment.

Before putting with this decision, we would like to observe that it is highly undesirable that where the longest term of imprisonment is awarded to an accused person, the punishment should be supplemented by an additional sentence of fine. The trial court, under misread the words of section 382, Indian Penal Code, and thought that it was obligatory to impose a sentence of fine, as it was of the opinion that even a sentence of life imprisonment was not enough and something else should be added to the sentence. This Court has expressed its view repeatedly in actual cases and if we recollect our even in those cases which have come up to this Court from Lucknow. It is therefore, surprising that the observations made by this Court are not read by the lower courts for we would not go to the extent of believing that they are being deliberately disregarded. We therefore set aside the sentence of fine of Rs 100 imposed upon the appellant. The fine if deposited should be refunded.

With the modifications mentioned above, this appeal is dismissed.

Revenue modified

CIVIL MISCELLANEOUS

Before Mr. Justice P. D. Bhargava and
Mr. Justice Mulla

PREM NARAIN TANDON (Petitioner)

THE STATE OF UTTAR PRADESH and another
(Respondents)

Background—*Plaintiff* for the *Grant* of the University from the *Donor* *Committee* and from the *Contributors* of *Expenditure* *Endowment* *Foundation* in the *Executive* *Council* of the University. *Terms* to *express* by *Ordinance* *Order* *validity* of—*U. P. Ordinance* *Ordinance* 1 of 1955 *validity* of—*Removal* of *Expenditure* *French* and *Scott*

Language *English*

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Mulla J

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Order of 1958 and 1959 validity of—Continuation of Act,
that Act 226 scope of

The Lucknow University Act 1958 was amended by Act VI of 1959 which came into force on 23rd March 1959. According to this Act 15 members were to be elected for the Court of the University from amongst the doctors and 28 were less were to be elected from the Community of Regulated Graduates and 20 members were to be nominated to the Executive Council of the University by the Chancellor.

Amul Narain, the petitioner was elected from the Regulated Community as a member of the Court of the Lucknow University on 15th August, 1958 for a period of three years and his term expired on 15th August 1961. Bala Nath Misra was elected from the Regulated Graduates Community as a member of the Court of the Lucknow University on 15th August, 1958 for a period of three years and his term expired on 23rd August, 1959. From Narain Tandon was nominated to the Executive Council on 15th October 1958 for a period of three years and his term expired on 15th October 1961.

The Removal of Delinquents (Fourth) Order amended the Removal of Delinquents (Second) Order to the extent that the prohibition contained therein to the commencement of Act VI of 1958 shall continue not later than 15th January 1959 notwithstanding the provisions of the Act or the Statutes in force before 15th May 1958. The effect of this order was that Amul Narain and Bala Nath Misra were to discontinue as members after the 15th January 1959.

The Registrar of the Lucknow University the respondent no. 2 issued a notice calling for nominations under the new Statute and Act VI of 1958 and dated 26th October 1958 in which he called for filing nomination papers for the Regulated Community every day after 26th October 1958 as the last date for filing nomination papers from the Regulated Graduates Community. Amul Narain and Bala Nath Misra, the petitioners filed separate writ petitions on 15th and 15th October 1958 respectively challenging the validity of the Removal of Delinquents (Fourth) Order of 1958. The nomination of From Narain Tandon is determined by the Removal of Delinquents (Fourth) Order of 1958 issued on 15th January 1959 which determined all nominations with effect from 15th January 1959. From Narain Tandon filed a writ petition challenging the validity of the Removal of Delinquents (Fourth) Order of 1958.

Held that the U. P. Universities Ordinance no. 1 of 1958 as amended empowers to affect the powers of the High Courts. It may have affected the rights of a party before the High Courts but the powers of the High Courts have remained the same. It is an Act passed during the presidency of the case which affects

the rights of the persons in custody. He said that there has been no disruption from the process of the High Court which is assigning the position of that Order which by the Commission is assigned to it. The validity of the Ordinance is not affected on this ground.

Held that the Ordinance passed does not only affect the Lok Sabha University about which was proposed, but pending in this Court, but it has also suspended the Lok Sabha and the Lok Sabha University Act. It was promulgated on April June 1968 when the session of the University was terminated. It is going to start and that would be the right and proper time if any change was required to be introduced. So that does not say by a new group of representatives from the very beginning of the session.

Agree from the fact that the Commission in which no Order was passed in any possible the Ordinance cannot be termed as a valid law.

State of Madhya Pradesh v. The Province of Bihar (1) *Export v. Domestic* (2) relied on.

Notes that it is only when a feature does not specially and in clear words take away vested rights that a Statute will be deemed to be in prospect. It is open to a legislature to take away a vested right by legislation particularly if it has been vested by a legislation itself.

Held also that there are clear words in the Ordinance which show that they are of a retrospective nature and they take away the rights of the persons.

United Provinces v. Mr. Atiya Begum (3) *State of Madhya Pradesh v. Atiya Begum* (4) *State of Madhya Pradesh v. Atiya Begum* (5) *State of Madhya Pradesh v. Atiya Begum* (6) *State of Madhya Pradesh v. Atiya Begum* (7) considered.

Held that when coming into force of the Ordinance the persons have no right left and the process must be dismissed.

Held that Universities are autonomous bodies and the courts should be reluctant as far as possible to interfere with the internal arrangements of the Universities. There should be no orders for any interference unless there is a palpable violation of law, which has occurred repeatedly in a broad and general sense. The rights of the persons are such which should be maintained by the High Court when their rights were determined.

State of Madhya Pradesh v. Atiya Begum (8) relied on.

(1) A. I. R. 1968 P. C. 20.

(2) A. I. R. 1968 P. C. 20.

(3) A. I. R. 1968 P. C. 20.

(4) A. I. R. 1968 P. C. 20.

(5) A. I. R. 1968 P. C. 20.

(6) A. I. R. 1968 P. C. 20.

(7) A. I. R. 1968 P. C. 20.

(8) A. I. R. 1968 P. C. 20.

(9) A. I. R. 1968 P. C. 20.

(10) A. I. R. 1968 P. C. 20.

(11) A. I. R. 1968 P. C. 20.

(12) A. I. R. 1968 P. C. 20.

(13) A. I. R. 1968 P. C. 20.

(14) A. I. R. 1968 P. C. 20.

(15) A. I. R. 1968 P. C. 20.

(16) A. I. R. 1968 P. C. 20.

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THE
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AND
INDUSTRY

Grand Mandamus Writ no. 15 of 1959 connected with writ petitions nos. 222 and 232 of 1958

The facts appear in the judgment.

R. K. Datta for the applicant.

The *Solicitor General*, *Sending Counsel* and *P. J. Somanath* for the opposite parties.

The judgment of the Court was delivered by—

V. D. Bhargava, J.—There are three connected writ petitions filed by three members, two of whom, that is, Anand Narain and Sd/s. Nish Math, petitioners in Writ Petitions nos. 222 and 232 of 1958, had been elected as members of the Court of the Lucknow University, while Pooni Narain Tandon, petitioner in Writ Petition no. 15 of 1959, was nominated by the Chancellor as member of the Executive Council of the Lucknow University. Petitioner Anand Narain had been elected on the 7th August, 1954, for three years and his term expires on the 6th August, 1959. Petitioner Sd/s. Nish Math was elected on the 4th August, 1956, for a period of three years and his term expires on 3rd August, 1959. Pooni Narain Tandon was nominated on the 6th of October, 1954, for a period of three years and his term expires on the 6th October, 1959.

Lucknow University Act, (Act V of 1903) is the main Act which had been amended several times later. The important amendment so far as the amendment of the Lucknow University Act by Act VI of 1955, which came into force on 17th March, 1956. According to that Act as amended by Removal of Doubts Orders of the State Government and Statutes framed thereunder, fifteen members were to be elected for the Court of the University from amongst those donors, who had given donations between Rs. 500 and Rs. 25,000, thirty members were to be elected from the Conservancy of Registered Graduates and five members, to be nominated to the Executive Council of the University by the Chancellor. Anand Narain petitioner was one of those who had been elected from the Donors' Conservancy, Sd/s. Nish Math from the Registered Graduates Class category, while Pooni Narain Tandon had been nominated to the Executive

Council. There have been about ten orders named as Removal of Difficulties Order, they being called first, second third, fourth, fifth and sixth order. Among them, Removal of Difficulties (Fourth) Order was issued by the respondent no. 1 the State Government by which the Removal of Difficulties (Second) Order was amended to the extent that the provisions contained prior to the commencement of Act VI of 1958 shall continue not later than 15th January, 1959 notwithstanding the provisions of the Act or the Statutes in force before 7th May, 1958. 7th May, 1958 is the date on which the Statutes were framed under Lucknow University (Amendment) Act no. 4 of 1954. The effect of this order was that so far as Anand Narain was concerned, he was not to continue as a member of the Court after 15th January, 1959. Similarly, both Nish Mera was also not to continue as a member after that date. As new elections had to be made under the new set up, on the 14th October, 1958, respondent no. 2 that is the Registrar of the Lucknow University issued a notice calling for nominations under the new Statutes and Act VI of 1958 and fixed 20th October, 1958, as the last date for filing nomination papers for the Donors' Constituency and by another notice dated 16th October, 1958, the Registrar issued a notice calling for nominations under the new Statutes and Act VI of 1958 and fixed 31st October, 1958, as the last date for filing nomination papers from the Registered Graduate Constituency. The petitioners Anand Narain and both Nish Mera came to that Court with writ petitions on 24th October and 25th October respectively and got an interim stay order from that Court staying the elections of the new members.

The nomination of Prem Narain Tandon was determined by the Removal of Difficulties (Sixth) Order of 1959 issued on 5th January, 1959 which determined all nominations with effect from 15th January, 1959. Petitioners Anand Narain and both Nish Mera challenge the validity of the Removal of Difficulties (Fourth) Order of 1958, while the petitioner Prem Narain Tandon challenges the validity of the Removal of Difficulties (Sixth) Order of 1959.

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(S. 115)

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As the matter is, it may be noticed that there are only just a few days left till when Seth Nath Moon and Arund Narain are to continue as members of the Court. As already mentioned, Seth Nath Moon's membership expires on 3rd August, 1959 and that of Arund Narain on 15th August. The right of Prem Narain also to be a member of the Executive Council, would expire soon after that is, on 8th October, 1959. The writ petitions of Anand Narain and Seth Nath Moon had been filed in October, 1958 and for about nine months they have succeeded in their attempt by means of an interim stay order. Since the period of Anand Narain and Seth Nath Moon is about to expire, their writ petitions have no particular practical utility. Prem Narain Tandon also is aware of the fact that his membership had been terminated from 15th January, 1959, has continued to be a member by means of an 'ad interim' stay order. To a great extent all the three petitions have succeeded virtually in their attempt to continue to be the members practically till the end of their term, without their suits being decided.

By notification no. 1422/XVII-244 1856 dated 23rd June, 1958, the Governor was pleased to issue the U. P. Universities Ordinance no. 1 of 1958 which had been promulgated by the Governor on 23rd June, 1958. This amended the English translation of the Uttar Pradesh Yashwanthpasha Adhyaksh 1956, (Uttar Pradesh Adhyaksh Sanikha 1 of 1956). The said Ordinance amended certain sections of the different Universities of Uttar Pradesh including that of the Lucknow University, Allahabad University, Azam Garh University and Gorakhpur University. In the present case we are concerned only with the amendment in far as the Lucknow University is concerned. By clause 4 of this Ordinance, the Lucknow University (Amendment) Act, 1957, was amended by making the following alterations:-

- (1) In sub-section (2) of section 11, for the word "either", the word "either" shall be substituted.

(2) after section 11, the following shall be added as a new section 11 A.

11 A. The term of—

(i) any member elected or nominated to any Authority or Body of the University under the provisions of the Principal Act or this Act or the Statutes framed under any of the said two Acts; or

(ii) any officer of the University and any member holding office as a member ship of an Authority or Body of the University as the case may be, by rotation in order of vacancy or in order of performance in accordance with the provisions of the aforementioned Acts and Statutes shall be and be deemed to have been, discontinued with effect from the date or dates mentioned in the orders and notifications issued or purporting to have been issued on this behalf by the State Government under this Act or the Statutes framed thereunder as if this Act had been in force on all material facts anything contained in any law applicable to the University to the contrary notwithstanding; and

(3) for subsection (1) of section 12 the following shall be substituted

(1) The State Government may, for the purposes of removing any difficulty particularly in relation to the transition from the provisions of the Principal Act to the provisions of this Act as amended by this Act, by order published in the official Gazette—

(a) direct that the Principal Act or the Principal Act as amended by this Act shall, during such period as may be specified in the order, take effect subject to such adaptations, whether by way of modifications, addition, or omission, as it may deem to be necessary or expedient; or

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cannot affect the vested rights of the prisoners in a pending proceeding in a court of law.

The first ground on which the Ordinance was quashed was that it has been promulgated without assent of the President. It is, therefore, hit by Article 213, read with Article 200. Article 213 of the Constitution of India provides as follows:

If at any time except when the Legislative Assembly of a State is in session or when there is a Legislative Council in a State except when both Houses of the Legislature are in session, the Governor is satisfied that circumstances exist which render it necessary for him to take immediate action he may promulgate such Ordinances as the circumstances appear to him to require.

Provided that the Governor shall not, without instructions from the President, promulgate any such Ordinance if—

(a)

(b)

(c) An act of Legislature of the State containing the same provisions would under this Constitution have been valid unless, having been reserved for the consideration of the President, it had received the assent of the President.

It was argued that it was one of those legislations, which did require the assent of the President because it would come under the second proviso of Article 200, which is in the following words:

Provided further that the Governor shall not assent to any Bill shall reserve for the consideration of the President any Bill which in the opinion of the Governor would, if it became law, so derogate from the powers of the High Court as to endanger the position which that Court is by this Constitution assigned to fill.

The learned counsel for the applicants contended that the Legislature has in effect taken away the powers of the High Court and had made it helpless on account of

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Laddi Narayan Das v. The Province of Bihar (1) was a case under section 88(1) of the Government of India Act (1935) which section was equivalent to Article 215. It was held there that—

The language of section 88(1) shows clearly that it is the Governor and the Governor alone who has got to satisfy himself as to the existence of circumstances necessitating the promulgation of an Ordinance. The existence of such a necessity is not a justiciable matter which the courts could be called upon to determine by applying an objective test.

In *Emperor v. Kameshwar* (2) and in *Bilugar Singh v. Emperor* (3) their Lordships of the Privy Council had held on a similar occasion for the Governor General, that the emergency which calls for immediate action has to be judged by the Governor General alone. On promulgating an Ordinance the Governor General is not bound as a matter of law to expound reasons therefor, nor is he bound to prove affirmatively in a court of law that a state of emergency did actually exist. In our opinion, Article 215 of the Constitution postulates only one condition, namely the satisfaction of the Governor as to the existence of justifying circumstances which is not liable to be challenged in a court of law.

It is true that there are also some authorities for the principle of law that abuse of the power is no exercise of the power and it has been often held with the approval of the Privy Council that an order made *malis fide* under the powers given by an Act or Ordinance is no exercise of such powers. This was accepted by their Lordships of the House of Lords in *Lovell v. Sir John Ainslie* (4) but in that case there should be definite evidence of *malis fide*. There is no material upon which we could hold that the orders were *malis fide*. Simply because they had been passed when the Legislatures were not in session or because they might affect the rights of parties in a pending litigation would be no ground to hold that the Ordinance was a *malis fide* one.

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Apart from the fact that the circumstances in which an Ordinance is passed is not germane we think that the Ordinance cannot be treated to be a valid side one. It has been passed not only affecting the Lucknow University about which writ petitions are pending in this Court but it has also amended Allahabad, Agra and Gorakhpur Universities Acts. It had been promulgated on 22nd June 1958 when the session of the University soon thereafter was going to start and that would be the right and proper time if any change was required to be introduced, so that there may be a new set up of administration from the very beginning of the session.

The main theme of the argument of the learned counsel for the petitioners was that the Ordinance actually did not affect a pending petition. Reference has been placed on the general principles of interpretation of a Statute. Reference was also placed on the following authorities by the learned counsel for the applicants. The first case is *United Provinces v. Mr. Abaqa Begum* (1) where *Sir James J.* had held

Undoubtedly an Act may in its operation be retrospective, and yet the extent of its retrospective character need not extend so far as to affect pending suits. Courts have undoubtedly learned very strongly against applying a new Act to a pending action, when the language of the Statute does not compel them to do so. It is a well recognised rule that Statutes should, as far as possible, be so interpreted as not to affect vested rights adversely, particularly when they are being brought. When a Statute deprives a person of his right to sue or affects the power or jurisdiction of a court in enforcing the law as it stands its retrospective character must be clearly expressed. Ambiguities as it should not be removed by courts, nor gaps filled up in order to make it applicable. It is a well established principle that such Statutes must be construed strictly and not given a liberal interpretation.

There can be no dispute with the proposition laid down by the Federal Court and we must respectfully agree not only with these observations, but also with other observations which had been made in other cases, which had been cited by the learned counsel for the prisoners.

Another case in which reference was placed in *Sudhya Ramya v. Mahanand Lach (1)* wherein it was held that—

Where the Statute is passed pending an action as distinct from after the date of the cause of action it has been held that wrong and clamant words are necessary to show the vested rights of either litigant as they stood at the commencement of action.

Thus according to this decision we must interpret the Statute itself in order to see whether there are clamant and wrong words or not, which have altered the vested rights of the prisoners. If they are, it is open to the Legislature to do so in spite of the fact that they are affected in a pending suit. The distinction between the rights in a pending suit and other rights is usually drawn where the Legislature passes a Statute which affects the rights of bringing a suit or a Statute affecting the right of appeal or affecting jurisdiction of a court. In that event, there may be a pertinent question which may arise as to whether the right to proceed with the suit or appeal without the Act being made specially retrospective, would affect the pending suits or the right of appeal. But if a Statute takes away a certain right from a certain party retrospectively, in *inter-se* terms, his rights would be deemed to have been taken away whether they are involved in a pending suit or not. The other cases, as we shall presently see, cited by the learned counsel are also cases where it was the right of suit or appeal or the jurisdiction of the court, which had been affected and the court was called upon to see whether the right of suit or appeal was affected. These cases in our opinion do not directly apply to the facts of the present case.

The case of *Spicer Loan and Banking Co., Ltd. v. Syed Ahmed Aliyaha (2)* is again a case in which the right of

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(1) A. I. R. 1950 Bom 234

(2) A. I. R. 1944 Cal 257

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was had been affected and in that case it was held that prima facie there was a direct interference of the Legislature in the effect that the pending suits would also be affected, new legislation would not affect the pending cases. By an amending Act of 1890 Money Lenders Act, it was provided that no money lender shall, in respect of any loan made before or after the commencement of the Act, in course, on account of interest and principal, whether through court or otherwise a sum greater in aggregate than double the principal of the loan. On these terms these Lordships had held that the account was not repaid, principal and it was only so affect suits which were filed after the Act. It was on interpretation of language of this Statute that the Court had come to that conclusion.

The case of *Shreepooja Kum v. Mahawath Kum* (1) cited by the learned counsel was a case where the Agra Partition Act had been amended retrospectively and affected the pending suits and a Bench of this Court had held

It is well noted that: a new enactment passed during the pendency of an action has not a retrogressive effect unless either it expressly says so or it lays down a new rule of procedure which it is the duty of courts to follow. On the other hand, if the amendment relates to substantive rights, as distinct from the subjective law it cannot affect vested rights and therefore would not be applicable to pending actions.

On the basis of this observation, it was argued that since the present legislation is not a change in the adjective law, but in the substantive law affecting vested rights, therefore, it should not be deemed to be retrospective. These Lordships in due course to the conclusion.

The Act before us is nothing like either of these two enactments and there is absolutely nothing either in the body of the Act, its title, preamble, or any good sense which would indicate that it was intended to have retrospective effect.

In the present case, if we read clause 4 of the Ordinance it is clear that it is meant to have a retrospective effect. It has been clearly mentioned there that the term of a member shall be and be deemed to have been determined with effect from the date or dates mentioned in the orders and resolutions. Therefore, this Ordinance was to come retrospectively into effect from the date on which the persons mentioned had been elected. There cannot be any manner of doubt, that so far as the reading of this Ordinance was concerned it was a piece of legislation which retrospectively affected a vested right and there had been no reservation of the right of a person in any pending action. Since it was apparent there are clear words in the Ordinance which show that they are of a retrospective nature and they take away the rights of the persons, we need not use further authority. Every decision has laid down the general proposition that unless a legislation makes an Act specifically retrospective, it shall not affect an existing vested right, and if according to our interpretation the present Ordinance has, not only implicitly and by its revision but expressly taken away the rights retrospectively then, by no manner of misgivings of Statute it can be said that the vested rights have been preserved. It is only when a Statute does not specially and in clear words take away a vested right that a Statute will be deemed to be prospective. It is open to a Legislature to take away a vested right by legislation particularly if it had been vested by a legislation itself.

The only case which to us appears to be on the point is *K. G. Madayya v. M. Ramana Aiyar* (1). That was a case where during the pendency of the appeal before the Privy Council a legislation was passed which took away the vested rights of the appellants before the Privy Council and their Lordships said

In these circumstances it appears to their Lordships that unless some savings can be implied as regards occupancy holdings which at the date of the

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N. D. Rajagopal, J.

The High Courts do not and should not, act as courts of appeal under Article 226. Their powers are purely discretionary and though no limits can be placed upon that discretion, it must be exercised along recognised lines and not arbitrarily and one of the limitations imposed by the courts on their selves is that they will not interfere jurisdiction in the class of case unless substantial injustice has ensued, or is likely to ensue. They will not allow themselves to be turned into courts of appeal or revision to set right mere errors of law which do not vitiate inquiries in a broad and general sense.

Therefore writ petitions should not be lightly entertained in this class of cases.

Universities are autonomous bodies and the courts should be reluctant as far as possible, to interfere with the internal administration of the University. There should be no occasion for any interference unless there is a palpable violation of law which has occasioned injustice in a broad and general sense. In the present case we do not think that the rights of the petitioners were such which needed any interference by the Court when their terms were determined.

It is not a case where the petitioners alone had been removed and certain other persons had been substituted. The entire body of management including the chair and the executive council was to be overhauled. The present petitioners had every right and possibly would have been again elected or nominated, particularly if they had rendered useful service on the bodies of the University. We think that in case, the entire management was desired to be changed, the Court should hesitate to interfere in the management of an autonomous educational body.

Another ground on which, at the present moment, we should not grant a relief is that, in any event, even if the rights of the petitioners had not been taken away retrospectively they at least had been taken away from the date of the Ordinance, that is 22nd June 1958. At the present moment granting any relief would be virtually

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ineffective and merely of academic interest. The court should be reluctant to grant such reliefs. This was the view also taken by a single Judge of the Calcutta High Court in *Satish Kumar Bose v. Commissioner of Exchange Municipality* (1).

No other arguments were urged before us.

We set us free in any of the writ petitions which, we accordingly dismiss with costs and award the costs of the opposite parties at Rs.100 in each petition, which they are entitled to recover from the petitioners.

Prisoners demand

APPELLATE CIVIL

Before Mr. Justice F. D. Mangrulkar and Mr. Justice Mulla

JANKI PRASAD HANUMAN PRASAD (Defendant)

HARSH CHANDRA TEWARI (Plaintiff)

1959
JANUARY 2

Landlord and Tenant—Notice—Rent for apartment—Purchase of a house—Application for possession—Permission by the Rent Control and Eviction Officer—Notice under s. 100 Transfer of Property Act, 1882—Permission under s. 5 of the M. P. Control of Rent and Eviction Act, 1947—Status validity of—Transfer of Property Act, 1882 s. 100 and Control of Rent and Eviction Act, 1947 s. 5 applicability and scope of—Clear maintainability of

In case no. 105 of 1955 the plaintiff became the owner of a house by virtue of a sale deed dated 26th June, 1955. He then went to obtain possession of the house. He sought permission of the Rent Control and Eviction Officer to evict the defendant and an order about the 24th December, 1955 was passed as follows:

I allow eight months time to the opposite party no. 1 and six months to opposite party no. 2 from the date of making this order to find out persons for themselves. The applicants will be permitted to occupy the opposite parties no. 1 and 2 the ten vacant the house within the given time.

The house was not vacated and a receipt dated 15th December 1956 purporting to be under s. 100 Transfer of Property

Act was served upon the defendant no. 1 on 21st December 1933 in which he was asked to vacate the premises by the 1st January 1934.

In between on the 30th December 1934 the plaintiff filed an application for permission under s. 3 of the Council of Revenue and Revenue Act for filing a suit. On the 18th February 1935 permission was granted by the Revenue Council and Revenue Officer and on the 15th April 1935, after obtaining permission the suit was filed.

The defendants went up in appeal against the order under s. 3 of the Commutation and the appeal was allowed on the 14th August 1935 with the result that there was then no existing permission. The plaintiff filed a revision against the order of the Commissioner to the State Government and on the 19th January 1936 before the suit was disposed of the State Government allowed the revision on which the order of the Commissioner was set aside and the permission granted by the Revenue Council and Revenue Officer on the 18th February 1934.

The defence to the suit was that the notice under s. 100 Transfer of Property Act dated 18th December 1934 was given prior to the obtaining of permission which was granted on the 18th February 1935 and therefore notice was sufficient and the suit was held to lie.

Held that the permission was granted by the order dated 30th December 1933 but even if no permission was granted it was permissible for the plaintiff to give a notice under s. 100 Transfer of Property Act, even prior to permission having been granted under s. 3 of the Council of Revenue and Revenue Act.

Held that a notice under s. 100 Transfer of Property Act will not be dependent on the existence of permission. It can be given before the permission is sought and amended or after the permission has been granted. The notice was a valid one and the suit was decreed.

Shri Ram Baidya v. Dhanwan Mahadvi (1), Ram Prang v. In Pore Lal (2), Dey Dey Prasad v. Dey Janki Prasad (3), Mahipati Dey Janki Lal v. L. Pore Lal (4) ruled on.

Special Appeal no. 16 of 1935 from a decision of *Gurga J.* dated 21st April 1934.

Ishtal Ahmad and F. N. Seth for the appellants.

S. D. Mura, A. N. Trivedi and R. R. Sahas for the respondents.

(1) 1934 A. L. J. 31
(2) 1934 A. L. J. 40

(3) 1935 A. L. J. 387
(4) 1934 A. L. J. 404

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ALLAHABAD
JUDICIAL
MAGISTRATE
OFFICE
ALLAHABAD
INDIA

1959

Case
Plaintiff
Respondent
v.
Respondent
Criminal
Trial

The judgment of the Court was delivered by—

V D BHOSNANI, J.—There are two connected special appeals against the judgment of a learned single Judge of the Court by the plaintiff of two different suits. They were connected because common questions of law arose. Both the appeals were disposed of by the learned single Judge by one judgment.

The facts of the case arising out of Regular Suit no. 182 of 1955 are as follows. The plaintiff claimed to be the owner of house no. 288/55 Ashbagh, Yakhaganj Ward, Lucknow by means of a purchase dated the 5th of June, 1951 Ex. 8. He alleged that defendant no. 1 was his tenant and defendant no. 2 was the sub tenant, that he obtained permission from the Rent Control and Eviction Officer to eject the defendants and also give notice under section 104 of the Transfer of Property Act but since the defendants have not vacated the premises, hence the suit. The plaintiff further alleged that the defendants were in arrears of rent and defendant no. 1 had sublet to defendant no. 2 and on this ground also they were liable to ejectment. The defence on behalf of defendant no. 1 was that he was not liable to ejectment on the ground of sub tenancy or on the ground of arrears of rent; that the notice given under section 104 was invalid and since the plaintiff refused to accept the rent, he was not entitled to sue decree on the basis of arrears of rent. Defendant no. 2 pleaded that he had been unnecessarily impleaded. The trial court framed the following six issues:

- (1) Whether defendant no. 1 committed default in payment of rent and if so on what effect?
- (2) Whether defendant no. 1 was served with a valid notice?
- (3) Whether plaintiff obtained permission to eject the defendant no. 1?
- (4) Whether defendant no. 1 has given Ex. 8) 8) 6 on papers and is he entitled to deduct the rent?
- (5) Whether defendant no. 2 is unnecessarily party?
- (6) To what relief if any is plaintiff entitled?

Issues nos. 1, 4 and 5 were actually not presented in the trial court and the two important issues in the case were only issues nos. 2 and 3. The learned Munsif held that the notice given by the plaintiff was a valid notice and the permission to eject the defendants had been obtained by the plaintiff and that had been confirmed by the District Commissioner and therefore the suit was a proper suit and he accordingly decreed the plaintiff's suit with costs against the defendants. The defendants went up on appeal to the District Judge of Lucknow. The only point that was argued before the learned District Judge was whether the notice under section 144 of the Transfer of Property Act was a valid notice or not. The learned District Judge held that the notice was invalid and, therefore, the suit for ejectment was dismissed. Similarly in the second suit also it was held by the trial court that the notice was a valid notice and therefore the suit was decreed. But the learned District Judge had upset that finding and held that the notice under section 144 was invalid and, therefore, he dismissed the suits. Against the above two decrees there were two second appeals which came up before Hon. Courts, J. who by his common judgment dated the 23rd April, 1935 allowed both the appeals and decreed the plaintiff's suits with costs. As the question involved was an important question of law he gave leave for special appeal in both the cases and these appeals have been listed before us for final hearing.

In order to appreciate the real point involved in the appeal it is necessary to give a few facts. In suit no. 148 of 1932 as we have already mentioned the plaintiff became the owner by means of a purchase dated the 29th June 1928. After the purchase he wanted possession himself. Therefore he sought permission of the Revenue Control and Revenue Officer to eject the defendants, who by an order, dated the 5th December 1932, Ex. 4, decided in the following terms:

Considering all the facts in view, I hereby allow eight months' time to the opposite party no. 1 and six months to the opposite party no. 4 from the

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date of making that order to find out premises for themselves. The applicants will be permitted if the opposite parties nos. 1 and 4 do not vacate the house within the given time.

After the opposite party no. 1 who is defendant appellants and was opposite party no. 1 in the proceedings before the court did not vacate within eight months, and there fore a notice dated the 15th December, 1954, purporting to be under section 166 of the Transfer of Property Act was served upon defendant no. 1 on the 12th December 1954, in which he was asked to vacate the premises by the 31st of January 1955.

In between on the 26th December, 1954, the respondent filed an application for permission under section 5 for filing a suit. On the 18th of February, 1955, permission was granted by the State Control and Eviction Officer and on the 14th April 1955 after obtaining permission the suit was filed.

The defendant appellants went up in appeal against the order of the Rent Control and Eviction Officer under section 5 to the Commissioner and the appeal was allowed on the 11th August 1955 with the result that there was then no existing permission. The plaintiff respondent filed a revision against the appellate order of the Commissioner to the State Government and on the 7th January 1956 before the suit was disposed of the State Government allowed the revision, set aside the order of the Commissioner and restored the permission granted by the Rent Control and Eviction Officer on the 18th February 1955.

In the present case the plaintiff was actually a purchaser and not an original owner and immediately after the purchase he had applied for permission to use. One of the questions that arise is whether such a purchaser should have been allowed permission, or not but that question is not material and was within the exclusive jurisdiction of Rent Control and Eviction Officer. It is true that the original owners may not be requiring the premises to use for their personal use, and, therefore, may not be entitled to ask for permission, but by

transferring the property, the original owner, thereby gives a right to the purchaser to erect a tenancy, who might be residing on the premises or carrying on business for a pretty long time and by that willing and authorising a new purchaser to erect the object of the Control of Rent and Eviction Act to a very great extent is frustrated. As the preamble of the Act shows that due to shortage of accommodations, it was considered expedient to provide for the continuance of the power to control the leasing and the rent of such accommodations and to prevent the evictions of tenants therefrom. In this way though the tenant may not have any apprehensions of being evicted by the original owner, a new purchaser may have the tenant by his agreement.

That matter as we have said is not within our jurisdiction to consider. It is for the State Government either to frame rules to the effect that a new purchaser for a limited period of five or ten years will not be entitled to ask for evictions on the ground of his own personal need or to issue directions to the Rent Control and Eviction Officer to see that the tenants are not harassed by the purchasers, but if they do not choose to do so, we do not think that the tenant can get any assistance from this Court.

On behalf of the appellant, it was contended that the notice under section 185 of the Transfer of Property Act dated the 15th December, 1954 was given prior to the obtaining of permission which had been granted on the 15th February 1955 and therefore the notice under section 185 was ineffective. According to the contention of the learned counsel for the appellant, section 126 of the Transfer of Property Act stands amended by section 3 of the Control of Rent and Eviction Act.

Section 185 of the Transfer of Property Act begins with the words "in the absence of a contract or local law or usage to the contrary" and it was argued on behalf of the learned counsel for the appellant that the use of the words "local law" makes it clear that section 185 was subject to section 3 of the Control of Rent and Eviction Act. Therefore, unless the requirements of section 3 of the Control of Rent and Eviction Act had been fulfilled, i.e.,

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 HARRIS
 Plaintiff
 v.
 HARRY
 CHARLES
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 Defendant

V. P. HUGHES
 JUDGE

The permission had been obtained, it was not open to the plaintiff respondent to give a notice under section 166 of the Transfer of Property Act and any notice given prior to the 19th of February, 1955, was an invalid notice and accordingly after the permission was issued under section 166 concerning the tenancy had been given and, therefore, the case is bad in law.

Further, it has been argued that as soon as a notice under section 166 had been given, after the expiry of the period mentioned in the notice, the tenancy would terminate and, therefore, the appellants would not be a tenant. On the other hand, by virtue of the provisions of Control of Rents and Eviction Act, the permission to be a tenant and therefore there would be an inconsistency if we were to hold that a tenant could be terminated prior to permission having been given by the Rent Control and Eviction Officer for being a tenant applicant, and on this ground it was urged that the judgment of the learned single Judge was not correct.

On behalf of the respondent besides the permission granted on the 19th of February 1955, notice was also placed on Ex. 4, dated the 5th December, 1954, and it was urged that the Rent Control and Eviction Officer had in fact granted permission to rent on that date and, therefore the notice of the 19th of December 1954, could not be said to be a bad notice because it was given after the permission had been obtained, and as the alternative it was contended that it was not necessary to give a notice under section 166 after the permission had been obtained.

We have considered the arguments of the learned counsel for the parties and we think that the judgment of the learned single Judge is correct.

We might first deal with the notice dated the 19th February, 1955. In our opinion that is a permission, though it is a conditional permission. Learned counsel for the appellants has argued that it was really not a permission because the order had said that the applicant would be permitted which means that he needed a second application. Reading the order as a whole, we think that the permission had been granted at that time and under the circumstances the other question does not

same fact for the sake of argument if we suppose that really no permission had been granted and possibly that rights have also been the subject of the plaintiff. Because he had applied for a first permission, we think that it was preferable for the plaintiff to give a notice under section 146 even prior to permission having been granted under section 2 of the Control of Rents and Eviction Act.

The Transfer of Property Act has no way been repealed by the Central and Executive Acts and, therefore, we have to interpret it. Both the Acts are running Chapter V of the Transfer of Property Act deals with the issues of immovable property and in section 103 a lease has been defined as follows

A kind of conveyable property is a transfer of a right to enjoy such property, made for a certain time, express or implied, or as perpetuity on consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferee by the transferor, who acquires the transfer on each series.

From the above definitions it is clear that a lease as envisaged under the Transfer of Property Act, is a finite term act, whose aim is to effect the transferee agree to let and the transferee agrees to take a premises on least on payment of a certain rent. The word, *tenant*, has not at all been used. Similarly, section 131 of the Transfer of Property Act also uses the word, *lease* and there it has been said that a lease of immovable property determines, amongst other grounds, on the expiry of a notice to determine the lease, or to quit or of intention to quit the property leased, duly given by one party to the other. This would be a notice under section 108 of the Transfer of Property Act. Therefore, what the Transfer of Property Act contemplates is the relationship of a *lessor* and a *lessee* between the so-called landlord and the tenant. The definition of a landlord and a tenant in the Control of Rents and Eviction Act is a little different. A landlord has been defined in section 2(c) as follows:

Landlord means a person to whom rent is payable for a room in respect of any accommodation.



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and includes the agent, attorney, heir or assignee of such person.

A tenant has been defined in clause (g) of the same section as follows:

Tenant means the person by whom rent is paid for a structure, expense or implied, would be payable for any accommodation.

The necessity of this definition was an account of the fact that by virtue of section 7 a tenant, even without the consent of the landlord, could be imposed upon him. A landlord and tenant may not have been each other and yet the relationship of the landlord and tenant would come into being by virtue of the Act.

Under these circumstances when a notice under section 104 of the Transfer of Property Act is given there may be an extinction of termination of a lease and that may be deemed to have been terminated with the expiry of the term of that notice, yet the relationship of the landlord and the tenant under the Control of Rent and Eviction Act would not come till the tenant is liable to be evicted under section 3 either when the landlord has obtained permission in respect of the conditions enumerated in clauses (d) to (g) of section 3(i) of the said Act comes into being. Thus in our opinion a tenant under section 104 will not be dependent on the existence of permission. It can be given before the permission simultaneously on the same date when the permission is sought, and awarded, or after the permission has been granted.

Even though a lease may be terminated, what section 3 of the Control of Rent and Eviction Act says is that the tenant would not be liable to eviction, unless the conditions enumerated in section 3 are satisfied. Section 3 of the Control of Rent and Eviction Act does not impose any restrictions on the landlord's right to termination of the lease but it imposes restrictions on his eviction, or, actual turning out of the tenant from the premises. There is no provision in the whole of the Control of Rent and Eviction Act whereby a tenancy could be determined and for the purpose it will be only the Transfer of Property Act which will be looked upon.

The whole object of the Control of Rents and Evictions Act, as we have already said, is to control the letting and the rent of such accommodation and to prevent the eviction of tenants therefrom due to the shortage of accommodation in Uttar Pradesh. The emphasis in the preamble is on the actual eviction.

There has been no direct case so far, dealing with the point, which is directly in issue in the present case, but there have been cases where a notice had been in default and a notice simultaneously under section 106 of the Transfer of Property Act and section 3 of the Control of Rents and Evictions Act had been given. This Court had held that such a notice was a valid notice. It was not necessary in such cases to wait for the expiry of the notice under section 3 before a notice under section 106 could be given. Two of the cases on this point are *Srinivas Reddy v. Srinivas Mahaseth* (1) and *Ram Prasad v. Sri Pawan Lal* (2). In the former case (Major, C. J.), and *Rox. J.*, held as follows:

A notice under section 106 of the Transfer of Property Act and a notice under section 3 of the U. P. (Temporary) Control of Rents and Evictions Act can be given simultaneously. Because if the tenant makes payment within one month of the service of notice of demand, the landlord will have no right to file a suit by reason of the provisions of section 3 of the Control of Rents and Evictions Act. In the 1954 case a Bench consisting of *AGARWALA and JUDG.* had held:

It is not necessary that a notice under section 106 of the Transfer of Property Act should be given after the expiry of one month as required by section 3 (1) (a) of the U. P. (Temporary) Control of Rents and Evictions Act. The notice under section 106 Transfer of Property Act can be coupled with the notice of demand of arrears within one month under section 3(1) (a) of the U. P. (Temporary) Control of Rents and Evictions Act.

In the case a notice was given under section 106 of the Transfer of Property Act, which required 15 days' notice,

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v. D. How
p. 3

(1) 1954 A. L. J. 31

(2) 1954 A. L. J. 317

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while a notice under section 3 of the Control of Rents and Eviction Act gave one month's time to the tenant to pay off the arrears of rent and it was argued that since the tenancy would be terminated under an provision of the notice under section 186 of the Transfer of Property Act, there would be an anomaly because the tenant will cease to be a tenant by virtue of clause (g) of section 111 of the Transfer of Property Act after 15 days, whereas he will not cease to be a tenant under section 3 (1), (a) of the U. P. (Temporary) Control of Rents and Eviction Act unless one month had expired and, therefore, it was contended that this anomaly can be removed only if the notice under section 308 of the Transfer of Property Act is given after the expiry of one month as required under clause 3 (1) (a) of the U. P. (Temporary) Control of Rents and Eviction Act.

This argument was very similar to the argument urged before us and it was replied by the Bench in the following words:

We do not think that there is a necessary conclusion upon a reading of the provisions of the two Acts together. The Transfer of Property Act is the general law of the land. The U. P. (Temporary) Control of Rents and Eviction Act is a special and local enactment, and as such overrides the provisions of the general Act so far as it is in conflict therewith. The two Acts have to be read together and the provisions of the general Act will stand amended to the extent of the inconsistency with the special Act. Section 3 of the U. P. (Temporary) Control of Rents and Eviction Act creates a bar to the eviction of a tenant. Unless the bar is removed no tenant is liable to be evicted. It follows, therefore, that although the notice under section 186 of the Transfer of Property Act has been given, the tenant is not liable to be evicted until one of the conditions laid down in section 3 of the U. P. (Temporary) Control of Rents and Eviction Act is fulfilled. There is quite of the expiry of the notice given under section 186 of the Transfer of Property Act, and in spite of the provisions of section 111 of the Transfer of Property Act, the tenant

does not cease to be a tenant till the fact is laid open.
 means laid down in section 3 of the U. P. (Twelve-
 my) Control of Rent and Eviction Act is laid

the respectfully agree with the above observations and
 they fully apply to the facts of the present case. It has
 been held in the Full Bench case of *Shagun Das v. Jai Lal* & *J. Pyare Lal* (3) that the permission of the
 District Magistrate for the eviction of a tenant from an
 accommodation must be taken to be one of the grounds
 mentioned in section 3 of the Act and therefore, though
 by a tenant under section 105 of the Transfer
 of Property Act read with section 111 of the same Act,
 a lease may be terminated, but the tenant is not liable
 to eviction as one of the conditions, viz., the permission
 of the District Magistrate having not been obtained, he
 would not be liable to eviction. To the same effect is
 the decision of a Bench of this Court in *Dev Prasad*
v. Jai Lal Prasad (2).

The facts of the other case from which the other appeal
 arises may also be mentioned. The plaintiff claimed to
 be the landlord of a house situate at Nandana, Lucknow,
 and alleged that the defendant was his tenant on payment
 of Rs 11-4 per month as rent. He served a notice under
 section 105 of the Transfer of Property Act on the 31st
 of March, 1935, to quit and vacate the plaintiff's house
 within one month from the date of receipt of the notice.
 He also applied for permission of the District Magistrate
 to file a suit. On the 5th of June, 1935, the permission
 to file a suit after the expiry of six months from the date
 of the said order was accorded to him. This period was
 to expire on the 3rd December, 1935, but the Control of
 Rent and Eviction Officer extended the period till the
 30th of June, 1936. There was a stay order as an appli-
 cation in revision was pending before the State Govern-
 ment under section 7 F of the Control of Rent and Evi-
 cion Act but the State Government by an order dated the
 2nd August, 1935, rejected the representation of the
 defendant and discharged the stay order. The plaintiff
 served another notice on the 30th of September, 1935,
 under section 105 of the Transfer of Property Act. A

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v. The State
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was filed on the 6th of August, 1958, which was numbered as Suit no. 348 of 1958. The actual notice of the discharge was not made by the Rent Control and Eviction Officer on the 15th August, 1958, and, therefore, the plaintiff filed another suit which has given rise to the appeal before us, on the 15th August, 1958, but there was to a withdrawal plea of the case being premature. In the present case the notice dated the 6th September, 1958, had been served after the permission had been granted, though the permission was conditional, and it was not open to the landlord to file a suit for eviction yet permission had already been given. Thus in the present case, if the defendant stands on such wider grounds.

Considering all the facts and circumstances of the case, we think that the decision of the learned single Judge is correct and we accordingly dismiss both the appeals with costs.

Learned counsel for the appellants in Special Appeal no. 18 of 1958 has urged before us that the appellants had been carrying on their business in the premises for a pretty long time which is of a very extensive nature. On account of dearth of accommodation it may not be possible immediately to get another accommodation, therefore, some time may be granted to the appellants during which they might be able to arrange for another accommodation. Ordinarily, one month's time would have been enough as provided under section 105 of the Transfer of Property Act, but considering the dearth of accommodation we think six months' time may be given to the appellants during which they should vacate the premises. In case the premises are not vacated within six months, it will be open to the decree holder to apply for the execution of the decree for eviction; but during the period of six months the decree against the appellants of Special Appeal no. 18 of 1958 shall not be executed. With this modification as already ordered, the appeal stands dismissed.

Appeal dismissed

APPELLATE CIVIL

*Suitor: Mr Justice P. E. Bhargava and Mr Justice
Nigam**

RAM FIARI SRIMATI (Plaintiff)

vs

SRIMATI BRIJRAMI and others (Defendants)

*Will—Maintenance—Charge in Property—Interpretation
of the Will—Indian Succession Act, 1925, s 177
applied to*

1938
December 23

Ram Sarup died in 1888 leaving some property and was succeeded by his mother and who she died in 1901 his wife and his mother, the plaintiff Ram Fari became the owner of half of area (a) and 1/32nd (b) and 1/32nd (c).

On 11th December 1924 Ram Fari surrendered all her rights in favour of her mother-in-law Mrs. Tulsia reserving to herself a right of residence and a sum of Rs 50 per month for her maintenance which was made a charge upon the property.

On 19th February 1928 Tulsia executed a deed of relinquishment of the property surrendered by Ram Fari, the plaintiff in favour of her husband Datta Das who became owner of it subject to the charge. On 1st May 1936 Datta Das executed a will disposing of the entire property. Datta Das died. Nigam Sahai also died in 1940. On 15th November 1948 Ram Fari died a sum for Rs 1,800 at the rate of Rs 50 per annum from 1st December 1928 to the date of the suit under the deed of relinquishment executed by her.

Held: One merely from the fact that a large amount was given to the plaintiff by Ram Fari the plaintiff it cannot be inferred that it appears from the will that she legatee wanted to discharge the debt by giving the legacy.

Pratap Prasad Mahto v. Prasad Prasad Balamoni (1)

Special Appeal No 6 of 1953 from a decision of Kalyan, J., (Lucknow Bench), dated the 23rd September, 1952.

The facts appear in the judgment.

*Sitting at Calcutta

In O.M. & L.C. No.

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Kramanulak, R. N. Shukla, B. L. Shukla and Jayant
solicitors for the appellants

B. L. Tuli for respondents nos. 1 and 2

S. C. Das and E. S. Farnes for all the respondents

The judgment of the Court was delivered by—

V. D. BHOSLE, J. —This is an appeal from the decision of a learned Single Judge of this Court in a second appeal.

The following pedigree is necessary in order to understand the facts of the case.



In November 1919 Ram Ichai having died previously, Datta Das and his three surviving sons Ram Chama, Ram Prasad and Ram Sarup divided the family property by a private partition. Properties entered as (a) and (b) of List A attached to the plaint were allotted to Ram Chama and that as (c) was allotted to Ram Sarup.

Ram Chama died in November 1917, and was succeeded by his widow Suman Tulsi alias Ram Babu who is defendant no. 5 in this suit. She transferred half of the property of item (b) and whole of item (a) to Ram Sarup purporting to do so under the oral will of her deceased husband. The remaining half of item (b) she transferred by the same deed to Shyam Babu and reserved to herself a maintenance allowance of Rs 15 p.m. which she made a charge upon all the properties transferred.

Ram Sarup died in 1923 and was succeeded by his minor son, Shyam Manohar who also died an infant later and, therefore, the plaintiff Suman, Ram Prasad alias Chandra Babu became the owner of half of item (b) and

para (i) and para (j). By the deed Ex 3, dated the 12th December 1914 she surrendered all her rights in favour of her mother-in-law Suman Tulsia reserving to herself a right of residence and a sum of Rs 25 per mensem for her maintenance. This allowance was made a charge upon the property conveyed by her to her mother-in-law.

On the 16th February 1926 Suman Tulsia executed a deed, Ex 4, relinquishing the property surrendered by Suman Ram Puri; the plaintiff, in favour of her husband Datta Das who became the owner of it subject to the charge.

On the 1st May, 1930, Datta Das executed a will by which he made arrangements for the entire property then owned by him. This will is Ex A 11. Therein he recites that there is no co-sharer in the property which he was bequeathing and since it was necessary to make arrangements of his property so that there may be no disputes after his death between his heirs and dependants he executed the deed. Shortly after the execution of the will Datta Das died. Suman Tulsia also died in 1930.

On the 12th December 1944, Ram Puri, executed the mutation of which the special appeal arose for recovery of Rs 1,800 at the rate of Rs 25 per mensem from the 1st December 1934 to the date of suit under the deed of relinquishment executed by her. She impleaded all the members of the family who were then alive and also the subsequent transferees but none of the two sons of Datta Das's daughter were exempted.

According to the plaintiff the sum of Rs 25 per mensem amounted to be a charge on the property which she conveyed to her mother-in-law and which later on was in turn first transferred to Datta Das and then to other members of the family and therefore she was entitled to a sum of Rs 25 per mensem which had not been paid to her.

On behalf of the defendants it was contended that since Datta Das had made full provision for the maintenance of Suman Ram Puri by giving her property

1926

Ex 3

Ex 4

Ex A 11

Ex 12

Ex 13

Ex 14

108
— from
Kailash
Singh
—
Jagannath
Singh
—
G.D.
Singh
—

worth Rs 1,00,000 as charge remained on the property and since the plaintiff assigned the will she was not entitled to make any claim.

The suit was dismissed by the trial court but the lower appellate court allowed the appeal and set aside the decree of the trial court and decreed the plaintiff's suit. A learned Single Judge of the Court on second appeal again allowed the appeal and made the decree of the lower appellate court and restored that of the trial court. Against that decree this appeal has been filed.

The only question that arises in this appeal is whether by that will the charge was removed or not.

Learned counsel for the appellants argues that as there is no mention of the charge in the will itself. Therefore, it does not appear from the will that the legacy was subject as a condition of that debt and therefore the executor or the plaintiff was entitled to the legacy as well as to the amount of the charge. Reliance was placed by the learned counsel for the appellants on section 137 of the Indian Succession Act.

Relying on the decision in *Forstater v Appa Rao v Parthasarathi Appa Rao* (1), it was further argued that it should be the words of the will which should be interpreted and no extraneous evidence or circumstances should be taken into consideration in interpreting the will as the will was unambiguous and clear. In the above case their Lordships of the Privy Council had relied among other English cases, on *Waddy v Phipps* (2) wherein it was observed:

These wills are perfectly plain and clear. The first duty of the court, expounding the will is to ascertain what is the meaning of the words used by the testator. It is very clear and that the intention of the testator is to be the guide, but that expression is capable of being misunderstood, and may lead to a question as to what the testator may be supposed to have intended to mean, whereas the

only and proper inquiry is, what is the meaning of that which he has actually written ? That which he has written is so to be construed by every part being taken into consideration, according to its grammatical construction and the ordinary interpretation of the words used, with the assistance of such parole evidence of the surrounding circumstances as is admissible, to place the court in the position of the testator.

1852
Rao
P. C. J.
Sunder
v.
Sunder
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It was contended by the learned counsel for the appellant that the learned single judge in this case has speculated as to what the testator is supposed to have intended to write and he has not interpreted the will as it should have been interpreted. The point taken by the learned single judge in consideration in deciding the case was that the testator intended to provide Shyam Bahari with a house and if this amount is also a charge on the property his house would be reduced practically to a nominal sum. The second consideration was that since he had made full provision for maintenance in the will much better provision than what she had by reason of a charge of Rs 20 therefore the testator must have been supposed to have given the legacy in lieu of the debt. Learned counsel for the appellant argued that there are considerations which are speculative and beyond the power of the court to go into.

Refresher has further been placed on a decision of the Bombay High Court in *Pannip Pannip Mistr v. Pannip Pannip Pannip* (1) where while interpreting section 177 which was then equivalent to section 164 of the Indian Succession Act it was laid down

"Where a testator has left no uncertainty as to the person to be benefited and the property by which the benefit is to be conferred then the courts are precluded from going outside the actual words used by the testator and the effect seems to have been given to this principle by the language of section 164 of the Indian Succession Act."

(2) (1951) 1 C 100

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It may be mentioned that section 177 is directly opposed to the principle of interpretation on that point under the English law where if one, being indebted to another in a sum of money, dies by his will gives a sum of money in gross as or greater than, the debt without taking any note at all of the debt, that shall nevertheless be in satisfaction of the debt and the legacy. While section 177 says that unless there is something in the will itself from which it appears that the legacy was meant as a satisfaction of the debt, the creditor is entitled to the legacy as well as to the amount of the debt.

In the present case it is true that the amount which has been given to Premnath Ram Prasad is far greater in amount than the charge of Rs 10 per mensem, but from that if we are going to conclude that it must be inferred, that the testator did not intend to pay the debt also, it would be in effect giving effect to the principles of English law and not to the language of section 177.

Premnath Ram Prasad case(1) was very much akin to the present case. There the testator owed the legatee a sum of Rs 1,500. This sum was not carrying any interest and that in lieu of interest the legatee was residing in the house referred to in the will. By the will the testator provided that his trustees were to give to his brother, Premnath Ram Prasad, Rs 1,500 namely three hundred, without interest and they were to get him to vacate the place in his house which he then occupied. Since there was no mention in the will that it was in lieu of the money, which the testator owed to the legatee, that he was giving this amount, though the amounts were advanced and though the sum given to his brother was not carrying interest and it appeared that this amount was given in lieu of the satisfaction of the premises, yet the learned Judge Judge held that apart from the will itself it did not appear so. It was not open to go beyond the will. The Court was very reluctant in this case to give that decision. So also too, in the present case. Merely from the fact that a large amount was given for gross we cannot infer that it appears from the will that the legatee intended to discharge the debt by giving the legacy.

(1) AIR 1951 Cal 100.

291
 Suresh
 Chandra
 Puri vs.
 P. P.
 Mehta
 (1959)
 100 Bom. 1

charred, whereas in the latter the latter has. In the former there is an agreement to purchase, whereas in the latter there is none. In each case the substance of the transaction or the agreement must be looked at and not mere words.

The agreement in this case related to car parking valued at Rs 12 6 and the defendant had bound himself to pay to the plaintiff the sum of Rs 3-6 as monthly hire of the parking space by month in advance. It was further agreed that if he had paid 12 months hire regularly on the due day, he should become the purchaser of the car parking without further payment. If on the other hand he failed to pay regularly the plaintiff had the option to cancel the transaction and terminate the agreement. The latter had himself no such option. The agreement was interpreted as one for sale of the car parking and not for a hire purchase of the parking. Reliance was placed in support of the view that was being taken on *Shank N. Dada v. Bombay Trust Corporation Ltd.* (1), *Lai v. Butler* (2) and *Helly v. Mathews* (3).

Subsequently another case came up before Mr. Justice Basu and is reported as *The Central Finance & Housing Co., Ltd. v. Moore*. *The British Transport Co.* (4).

After referring to the earlier cases on the point the learned Judge laid down

In determining the question as to the nature of such (hire purchase) agreement, the Court should not be led away merely by the ostensible appearance given to the transaction by the words used by the parties, but should make an attempt to go behind the phraseology for the purpose of ascertaining the real intention of the parties. In other words, it is not the garb with which the parties choose to clothe the transaction that should guide the courts, but it is the spirit permeating the transaction that should be the determining factor of its real nature.

As the Court tries to ascertain the real nature of the

1 A. I. R. 1950 Bom. 204.

2 L. R. (1950) A. C. 471.

3 L. R. (1951) 2 K. 348.

4 1959 A. L. J. 404.

transaction, the court should take into consideration all the circumstances of the case. It cannot be said that any one particular circumstance prevails as and test in the case. Thus, for example, where it is apparent that as a result of the agreement, the transferee has eventually to pay the entire purchase price it may be a circumstance indicating that the transaction was meant to be a sale. On the other hand if the transferee is given a right to terminate the agreement that may be an important circumstance indicating that the transaction was intended to be a hire purchase agreement.

The same view appears to have been taken more recently by a Full Bench of the Hyderabad High Court in *Kamal Narayan v. An Ishwari Laxmi Narayanan* (1). There it was observed as follows:

The leading test for determining whether an agreement is that of sale or of a hire purchase is to take into consideration the fact that whether an option to terminate the agreement has been reserved to the buyer. And if such an option is given, then the agreement is generally held to be of hire purchase. In other words, where a person had a right to terminate the agreement for hire at his pleasure and is not bound to pay the value of the goods, it is a hire purchase agreement. The option, however, must be real one and the buyer must not be compelled to the exercise of the option.

We do not think it necessary to refer to any other tests on the point though there are many. The test, as has been laid down, is clear. It is, whether a real option has been given to the alleged buyer to terminate the agreement at any time he likes. If such an option has been given to him the transaction must be interpreted as that of a hire purchase. If, on the other hand there is no such option and the alleged buyer has to pay the entire amount the transaction must be held to be a sale.

Now if we look to the agreement in the case before us, it is clear that in this case no option at all was given

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It is interesting to note in this connection that in the agreement before us the plaintiff too did not reserve to himself the right to terminate the agreement and to take back the cycle at the time he liked. There is no term providing for a right of return after forfeiting the payments already made as here.

We therefore think that the learned Small Cause Court Judge was perfectly justified in interpreting the agreement in the way in which he interpreted it. The agreed price was ultimately Rs 148 and out of it Rs 72.8 had been paid in instalments. The balance due to the plaintiff was the amount for which his suit was decreed. On the agreement, as it stood, we think it was not open to the plaintiff to claim any costs amount.

The decree passed by the learned Small Cause Court Judge was therefore quite correct and no interference appears to be called for. The application in revision is, therefore, dismissed with costs.

Benares District

APPELLATE CIVIL

Before the Honourable O. H. Hoolehan, Chief Justice
and Mr. Justice Dwyer

SADU RAM

(Appellant)

v

STATE OF UTTAR PRADESH AND OTHERS

(Respondents)

1954

January 18

Feature of Gans Sabha—Type of as recorded in the family or adult register—Whether final and conclusive and not liable to be reopened on admission before District Panchayat—Panchayat Reg. Act 1947 or S.P. and U.C.—Panchayat Reg. Rules, 1947

The expression used in rule 3 (2) of the Panchayat Reg. Rules is (the register as regulated shall be final) and not it need be so—final and conclusive which has been used in other parts and the other provisions in the Act. The finality attached to the register seems to and must be confined to proceedings under rule 3 (2) dealing with the general purpose type of the register of members of the Sabha and the other matters are open to revision or correction by prescribed authorities in appropriate cases such as those under rules 6 or 11.

The Election Tribunal is therefore quite competent to go behind the relevant entry in the register and to find on the evidence adduced the actual age of the person elected as Member.

Issue: Whether the question of a person being an adult and entitled to vote at the election of the Panchayat may be opened on the election petition notwithstanding the fact that he was so recorded in the adult register?

Deliverance: *Prasad & Mohd. Ghani (J.)* explained the distinction of U.C. J. in *Ram Singh & Sub-Commissioner Officer* (Case 15) and the relevancy of rule 19B leading to the issue now questioned.

The Full Bench decision in *Ghulam Mohamud v. The Election Tribunal of Faizabad* (Case 12) distinguished on the ground that the distinction in question under the Town Areas Act was confined to persons whose names had been entered in the electoral rolls whereas that under the Panchayat Reg. Act was available to adults only.

Special Appeal No. 349 of 1954 from a decision of *Tribunal, J. in Civil Miscellaneous Writ No. 1218 of 1954*, dated 17th March, 1954.

(1) A. I. R. 1954 All 1

(2) 1954 A. S. 1 100

ON 11.1.54 (1954) 18 JAN 1954

120 The facts appear in the judgments
 121 *Suresh Chandra Singh and R. P. Singh* for the appellants
 122 *A. P. Gupta* for the respondents.

123 The judgments of the Court was delivered by—

124 *BRIDGES, J.*—This is a special appeal against an order
 125 of Mr Justice TAYLOR, dismissing a petition under
 126 Article 226 of the Constitution.

127 Babu Ram, the appellant, was declared elected Pradhan
 128 of Gram Sabha Kurha as a result of an election held
 129 in 1955. Harnam Gur, respondent no. 3, filed an elec-
 130 tion petition before the Sub-Divisional Officer and chal-
 131 lenged the appellant's election on the ground that he was
 132 less than thirty years of age at the time of his election
 133 to the office of Pradhan. The Sub-Divisional Officer
 134 found on the basis of evidence before him that the appel-
 135 lant was actually less than thirty years of age at the time
 136 of his nomination and consequently allowed the election
 137 petition, set aside the election of the appellant and de-
 138 clared Harnam Gur to be the duly elected Pradhan of
 139 village Kurha. The appellant then filed the writ peti-
 140 tion and prayed for the quashing of this order of the
 141 Sub-Divisional Officer.

142 The grounds, urged against the correctness of the order
 143 of the Sub-Divisional Officer were: firstly that no question
 144 of improper acceptance or rejection of a nomination
 145 arose when no objection to the nomination of the appel-
 146 lant was taken at the time of the scrutiny of nomination
 147 papers and, secondly that the question of the appellant
 148 being not qualified to be chosen a Pradhan on account
 149 of his being less than thirty years of age had to be decided
 150 by the prescribed authority, that is, the Tahsildar in
 151 view of the provisions of section 5-A of the U. P.
 152 Panchayat Raj Act, 1947, read with rule 14 of the U. P.
 153 Panchayat Raj Rules. The other grounds mentioned in
 154 the petition dealt with the correctness of the entries
 155 filed upon by the Sub-Divisional Officer or the admin-
 156 istrative in evidence of the documents considered by the
 157 Sub-Divisional Officer. They also challenged the pro-
 158 perty of declaring Harnam Gur to be the duly elected
 159 candidate. They did not, however, include the ground

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11. A member of a Guco Sabha shall not be qualified to be chosen as President unless he is not less than 30 years of age.

Section 9 of the Act provides for the preparation of the register of members and is

On the establishment of a Guco Sabha the prescribed authority shall cause to be prepared a register, in the prescribed form, of all persons ordinarily residing within the jurisdiction of such Guco Sabha and such register shall, among other things, contain the names of every person who had under section 5 (a) become a member of the Guco Sabha on the date of its establishment. The register so prepared shall be revised at least once a year, in the manner prescribed.

Chapter 1 B of the Panchayat Raj Rules deals with the preparation of the register of members, its periodical revision and its custody and preservation. According to rule 4 the register is to be prepared in accordance with the provisions of the Act, the rules contained in the Chapter and the directions issued by the Director of Panchayats. It is to be a register of the members of the Sabha.

Rule 4 A prescribes the form of the register and sub-rule (1) says that the register will be prepared in Form A. According to sub-rule (2) the register is to be in two parts. Part I called the family register, is to contain the names and particulars of all persons, family-wise ordinarily residing in such village included in the Sabha, and Part II called the adult register is to contain the names and particulars only of those adults who are entitled to be members of the Sabha under section 5 of the Act, that is to say adults who are not disqualified, i.e., who are not citizens of India or are of unsound mind and stand so declared by a competent court. Part I of Form A has twelve columns. The eighth column is for noting date of birth if known or probable date of birth of the person concerned. Part II has nine columns. The seventh column is for date of birth. It is clear that the entries in Part II are made on the basis of the entries in Part I. The names of such persons in Part I are

shown over to Part II) as according to the known or probable date of birth have attained the age of 21 years at the time of the preparation of the register.

The draft register prepared by the Secretary of the Sabha is published in view of rule 4 F. Claims and objections in the nature of the register are filed in view of rule 4 H and are disposed of in accordance with the provisions of rule 4 J and rule 5. All these claims and objections except those which raise any question of the nature referred to in section 5 A of the Act are disposed of by the Panchayat Inspector on summary enquiry. His orders are subject to revision by the Tahsildar whose decision is final. A copy of the Tahsildar's decision is forwarded to the Secretary of the Sabha who in view of sub-rule (1) of rule 5 makes the necessary amendment in the draft register of members. The amended register of members is then re-published in view of sub-rule (2) of rule 5, and it is this re-published register which sub-rule (2) makes final. The contention for the appellant is that the finality given by that rule to the register is such a finality that the correctness of the names therein are not to be questioned by the Sub-Divisional Officer as an Election Tribunal.

The finality given to the register under sub-rule (2) of rule 5 cannot be a finality of the kind suggested for the appellant. Thus it does from the other rules to be referred shortly. If sub-rule (2) of rule 5 gave such a finality to the entries in the register, the rule will be ultra vires of the State Government. Section 110 of the Act empowers the State Government to make rules consistent with the Act to carry out the purposes of the Act. It is clear from section 4 of the Act that only adults can be members of the Gram Sabha. Persons who have not attained the age of 21 years are not adults in view of the definition of the word 'adult' in clause (b) of section 2 of the Act. If the register of members has such a finality as urged for the appellant in view of sub-rule (2) of rule 5, a person less than twenty-one years of age can be a member of the Sabha and a person less than thirty years of age can be chosen Pradhan if their names have been recorded in the adult register by mistake. The rule will then not be helpful in carrying out the purposes of

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was the Act but will be conclusive in the construction of the provisions of Act. It seems therefore to be a valid rule. Such an interpretation, therefore, is not to be given to this rule unless the language of the rule shows it. In this case it is already indicated the rule itself would be bad and would not affect the competency of the Sub-Taxation Officer to look into the contention for the delay in conclusion that the person elected for the post of Pradhan was actually less than thirty years of age.

The relevant expression in sub-rule (2) of rule 5 is

The register so re-published shall be final. It is not that the register so re-published shall be final and conclusive. That would have been a stronger expression though even then it would be open to argument whether that would give conclusiveness to the entries in the register. In this connection reference may be made to sections 15, 12 C and 12 D of the Act. Section 15 makes the decision of the State Government on any dispute relating to interpretation of any provision of the Act final and conclusive. Sub-section (5) of section 12 C makes the order of the prescribed authority on an election petition final and conclusive and further provides that it shall not be questioned in any civil court. Similarly section 12 D makes the decision of the prescribed authority in any dispute relating to the election of Up Pradhan final and conclusive and also provides that it shall not be questioned in any civil court. It is to be noticed that no such expression about conclusiveness or intimation from being questioned in a civil court is used with reference to the decision of the Tribunal in sub-rule (4) of rule 4 or with reference to the re-published register in sub-rule (2) of rule 5.

Provisions in other Acts, with respect to certain orders being final, have been incorporated in notes that those orders are not subject to any appeal. Those orders can be subject of revision by a superior authority. It follows that the expression, The register so re-published shall be final simply means that the entries made after the amendments as a result of the orders of the competent authority as the claims and objections will be no more open to further claims for entries or objections requiring

the deletion of entries in that register. The finding attaches to the form of the register and not to the correctness of the entries made therein. The entries can be questioned in an appropriate manner on an appropriate occasion and can be disposed of by the authority competent to deal with the objections concerning those entries.

Section 4 of the Act provides for the revision of the registers at least once a year and thus implies that it can be revised more frequently.

Rule 6 of the Panchayat Raj Rules lays down the procedure for the deletion of such claims and objections which raise any question of the nature referred to in section 4-A of the Act. It may be noticed at once that this rule follows rule 5 and there is nothing in rule 6 which provides for amendment of the draft register on the basis of the deletion of such claims and objections. On the other hand, sub-rule (4) of rule 6 provides for a copy of the order passed by the Tahsildar under sub-rule (1), as modified or appeal if any under sub-rule (3) to be forwarded to the Secretary of the Panchayat Inspector. Rule 7 provides that on receipt of such a copy of the order the Secretary of the Panchayat shall if necessary strike off the name of the person concerned from the register of members and shall send an intimation thereof to the person concerned. This rule itself therefore indicates that the entries in the registered registers are not final and conclusive. They can be struck off and we think therefore their correctness can also be questioned.

Rule 8 provides for the making of necessary changes in the family register consequent on births and deaths, if any.

Rule 10 provides for special revision of the register. The Director of Panchayats for reasons to be recorded in writing can direct the revision of a register of members or a part thereof.

Rule 10-A empowers the Panchayat Inspector to order the correction of any wrong entry in the register of members. Of course, his orders are subject to the direction issued by the Director of Panchayats.

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Rule 11 gives a right to any person whose name is not included in the register of members to apply to the Panchayat Inspector for the inclusion of his name and the Panchayat Inspector if satisfied after such enquiry as he thinks fit about his right to be registered, can direct that his name be included in the register.

Rule 14 deals with objections under section 5A pertaining to disqualifications when a question referred to in section 5A of the Act is raised otherwise than as a claim or objection. Such a question is also decided in the first instance by the Tahsildar, whose orders are subject to appeal to the Sub-Divisional Officer. Sub-rule (7) of this rule provides for the Secretary of the Sabha to strike off, if necessary, the name of the person concerned from the adult register.

All these various rules, therefore, make it clear that the entries in the re-published register are open to revision, to being struck off and to being added to and therefore lead to the conclusion that the entries in the first published register are not final, so that even if they are erroneous must be accepted even when challenged.

An error with respect to age in the register of members cannot be taken to be correct when the very basis of it can be of doubtful accuracy. Column 8 Part I of Form A requires the entry of the date of birth even when it is not correctly known. When a probable date of birth is noted, it should be open to a person to show that what was alleged to be a known date or so far a probable date was not really the correct date of birth of the person concerned. A similar reference is also to be drawn from the fact that even the claims and objections to the entries in the first register are disposed of as a result of a summary enquiry by the Panchayat Inspector.

We are therefore of opinion that the entries in the register of members are not conclusive and that the Sub-Divisional Officer is competent to decide the question about the correct age of the person elected and is not bound to accept the entries in the register of members as correct.

Secondly, it is urged for the appellants that the mere fact that the appellants though less than thirty years of

age has been elected. Pradhan did not object to the result of the election being materially affected by gross failure to comply with the provisions of the Act or the rules framed thereunder. The contention is that the Returning Officer has not failed to comply with any provision of the Act and that he has followed the correct procedure laid down by the Act and the rules. It just happens that a person less than thirty years of age was nominated and was elected by the majority of voters. Support for this view is sought from the case of *Dadhwan Prasad v. Mulchand* (1) wherein Duttal, J. mentioned the various submissions made in support of such a contention at page 13 and then said as follows:

There is much force in all these arguments advanced on behalf of the petitioner, but the opposite view has been taken by the Supreme Court in the case of *Bhaga Shankar* (2).

It was held there that if a person constitutionally disqualified is elected, it is a case of non-compliance with the provisions of the Constitution. On this reasoning allowing the petitioner, if he was under age, to be elected as a Pradhan, would amount to non-compliance with the provisions of section 5-B of the Act.

The case does not support the appellants. The paragraph on which reliance is placed, viz. the expressions of opinion of Duttal, J. but are the words of the dissent, not used before him.

Reference is also placed on the case of *Ram Singh v. Sub-Divisional Officer, Chunar* (3) wherein Duttal, J. observed:

The combined effect of section 5 and rule 13-B is this. A person, whose name is recorded in the Adult Register is entitled to vote, even if the name is wrongly recorded in the Adult Register. The Returning Officer and the Election Tribunal have to assume that that person is entitled to vote.

The question for decision is, that case was different from the question before us. An election petition was dismissed on the ground that the defendant candidate had

(1) A. I. R. 1958 All. 7.

(2) A. I. R. 1954 A. C. 559.

(3) 1958 A. I. J. 225.

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failed to prove that ten persons who had voted for the successful candidate were minors. The defeated candidate then filed the writ petition, and on the assumption that those ten persons were minors, Oat. J. held that if their names were on the register of electors they were entitled to vote. With respect, it can be said that this question did not really arise in the case where on a question of fact the petitioner had failed before the Election Tribunal. The question was really decided on the basis of rule 19 B which gave a right of vote to a person whose name was entered in the whole register. The validity of this rule is very much open to question in view of section 11 B of the Act which provides that the Prudhans shall be elected by the members of the Gram Sabha which according to section 5 can be adults only.

Reference is further placed on the Full Bench decision in *Ganesh Mahadik v. The Election Tribunal for Town Area Sahar (1)*. That case did not relate to the election of a Pradhan of a Village Panchayat but related to the election of a Chairman of a Town Area Committee, and the question to be decided was whether the Election Tribunal could look into the contention that the names of certain persons should not have found a place in the electoral rolls prepared for certain wards in the Town Area on the grounds that some of them were minors and that some did not reside within the wards concerned. Sub-section (2) of section 8 A of the U. P. Town Area Act, 1914 provides that the Chairman is to be elected by the electors of the Town Area. The electors according to rule 5 of the Uttar Pradesh Town Areas (Conduct of Election of Chairman) Rules, 1953 are the electors entered in the electoral rolls of the wards of the Town Area. Section 8 F of the Act gave the right of vote to a person who was for the time being entered in the electoral roll of any ward. It was in view of these provisions that the Full Bench held that it was not open to the Election Tribunal to determine whether the persons whose names were entered in the electoral roll possessed the necessary qualifications for the registration of their names in the electoral roll and that the fact that a

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as the above lands against the defendants. On 15th March, 1957, there was a compromise between the parties, under which the defendants were to pay Rs 20 per month as rent up to 30th June 1962, and the defendants were permitted to continue as tenants up to 30th June 1962 when they were to give up possession of the plots to S 1 and P. The defendants did not give possession and after the expiry of 30th June 1962, S 1 and P the plaintiffs filed a suit for possession against the defendants who pleaded that they were tenants under s. 106 of the Zamindari Abolition and Land Reforms Act and were not liable to evictions. This is a Second Appeal by the defendants.

Held: (i) that the defendants acquired tenants rights under s. 106 (a) (i) of the Act, and that acquiring tenants rights they were entitled to claim possession of the land in respect of which they acquired their rights.

(ii) that the defendants acquired tenants rights with periodicity of the compromise and the terms of the compromise did not in any manner affect the rights acquired by them under the Zamindari Abolition and Land Reforms Act. Their rights are not subject to anything which they had said or understood under the compromise.

(iii) that s. 209 of the Act did not apply to the defendants since persons who are in possession of the property under the provisions of the Statute.

(iv) that s. 214 of the Act is inapplicable, as the defendants had done for agreement do not apply to this case.

(v) that the grounds on which the agreement of an tenants can be sought have got to be at any rate evictions grounds the grounds mentioned in s. 106 of the Act and the rest of the plaintiffs is liable to be dismissed.

Second Appeal no. 427 of 1954 against the decree of G. M. Prasad Agarwal District Judge of Gonda dated 11th October, 1954.

The facts appear in the judgments.

Hyder Hyatun for the appellants.

H. D. Swaminathan for the respondents.

The judgment of the Court was delivered by—

MURRAY, J.—This is a second appeal arising out of a suit for eviction under section 106 of Act I of 1948, viz. the U. P. Zamindari Abolition and Land Reforms

Act. The circumstances which gave rise to the suit were these:

One Sarker was the hereditary tenant of certain plots of land. On the 1st of July 1942 Sarker sold these plots to Jwala Prasad and others who were the defendants to the suit. Some years after purchasing Sarker died, and he was succeeded by Santana and Purni in respect of the lands. Santana and Purni filed a suit proving for a declaration of their rights in the land for ejectment of the defendants and for delivery of possession being given to them of the lands from which the defendants were to be ejected.

On the 15th March 1948 there was a compromise as the aforementioned suit and under the compromise the defendants were permitted to continue in possession of the land in suit till the end of 1950 *viz.* up to the 30th June 1952. The defendants under the compromise were to pay Rs 20 per annum as rent and after that period, *viz.* after the 30th June 1952, they were to give up or relinquish possession in favour of the tenants in chief, the plaintiffs of that suit.

The defendants did not give up possession of the lands in suit after the expiry of the 30th June 1952. They continued in possession and the desire of the plaintiffs to get back possession from them voluntarily proved of no avail. Thereupon the plaintiffs filed the present suit out of which the present appeal has arisen. This suit was filed by Santana and Purni against Jwala Prasad Shyam Shukla Jagannath and Daya Shankar Pradhan of Gram Sahas of Udaipur. The suit was one, as we have said, under section 209 of the Zamindari Abolition and Land Reforms Act and was filed on the 2nd January, 1953.

The defence of Jwala Prasad and his co-defendants was that they had purchased certain rights under section 20 of the Zamindari Abolition and Land Reforms Act and, therefore, they were not liable to ejectment by enforcing a term of the compromise which had been entered into before the Zamindari Abolition and Land Reforms Act came into being, namely the compromise dated the 15th March, 1948.

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The learned Master of Turbigan, Gonda, who tried the case held that the defendants had purchased to themselves the rights of an addressee under section 50 of Act I of 1948 but even so he held that because of the provisions of section 251 of that Act the defendants were liable to be evicted because one of the liabilities which they had undertaken was the liability to go out of possession of the lands on the 30th June 1952. In short, what the trial court held was that since section 251 of the Zamindari Abolition and Land Reforms Act was applied the liability which a person prior to his becoming an addressee, undertook and since further the defendants had under the compromise undertaken to go out of possession after the 30th June 1952 therefore that liability of theirs could be enforced by the suit.

There was an appeal and the lower appellate court must or less took the same view which the trial court had taken and affirmed the decree for eviction which had been passed by the trial court.

The defendants therefore have come up as Second appeal to this Court. The Second appeal originally came before a learned Single Judge who referred it for decision to a Bench.

The questions that arise for determination in this appeal may be stated thus:

- (1) Did the defendants acquire the rights of an addressee under section 50 of the Zamindari Abolition and Land Reforms Act and if they did under which part of the section they acquired such right?
- (2) Whether after having acquired the rights of an addressee if they did so by virtue of section 50 of the Act could they be evicted from the lands in respect of which they acquired addressee rights because of the compromise entered into by them on the 13th March, 1948?
- (3) Whether the words 'the liabilities entered into by section 251 of the Zamindari Abolition and Land Reforms Act referred to the liabilities of the type under which could arise the liability which

was undertaken by the defendants by the compromise of March 1949?

(4) Could it be said that the defendants acquired the rights of an *adversus* on the basis of the compromise or did they acquire those rights independently of that compromise and if they acquired the rights of an *adversus* independently of that compromise whether any obligation or any liability arose and under this compromise could or could not be enforced by virtue of the provisions of section 231 of the Act?

(5) Whether an *adversus* can be agreed on any other grounds including a contractual obligation made by him which did not quite fall within the grounds for agreement mentioned in section 231 of the Act?

As we have noticed earlier, the defendants were tenants and so each they acquired *adversus* rights under the provisions of section 23(4) (a) of the Zetland, Abolition and Land Reform Act. It was conceded by counsel on both sides and indeed it was accepted by the courts below too that the defendants did acquire the status of an *adversus*. What however was not correctly stated by the lower appellate court was the proviso under which that right was acquired. As we have said in our view the defendants acquired *adversus* rights under section 23(4) (1) and after acquiring *adversus* rights they were entitled to retain possession of the land in respect of which they acquired those rights.

Section 231 of the Act mentions the rights of *adversus*. The section is in these words:

231. *Rights of an adversus*—(1) Except as provided in sections 233, 234 and 237 and subject to his paying the rent, an *adversus* shall continue to have all the rights and the liabilities which he possessed or was subject to in respect of the land on the date immediately preceding the date of vesting.

Provided that notwithstanding anything contained in any contract or other engagement the rent payable by the *adversus* shall not be varied except as permitted by this Act.

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(2) Where an address does not interfere in the holding shall, in the matter of devolution, be governed by the provisions contained in sections 131 to 135.

The provisions of the abovesaid section 231 clearly indicate that the address is to continue to have all the rights and liabilities which he possessed as to which he was subject in respect of the land on the date immediately preceding the date of vesting. The question, therefore, that falls for determination under the circumstances in this case is whether the defendants could be said to have been under a liability, as contemplated under section 231 of going out of possession, because they had under the compromise undertaken to go out of possession voluntarily after the 30th June 1952. In short, the question is whether that agreement, in the compromise, could be termed as one of the liabilities to which the defendants were subject to immediately preceding the date of vesting. If the defendants could be said to have acquired address rights by virtue of the compromise, then there could be no difficulty in saying that they were subject to the liabilities which they had undertaken under that compromise, if there was any liability under the terms of the compromise. But if the acquisition of their rights as address was independent of and outside the compromise, then in our view it could not be contended reasonably that the address rights as address were subject to any liabilities they had undertaken under the compromise. By the compromise the defendants did not acquire the status of a sub-tenant; that status they enjoyed prior to the compromise. The compromise only recognised that status to that immediately preceding the date of vesting; they were sub-tenants. Under the compromise the defendants agreed to give up possession after the 30th June 1952, but no specific date was fixed for their doing so. All that was recognised under the compromise was that the defendants were to continue to enjoy the status of a sub-tenant on payment of rent from 1950 to the end of 1959 Padi. Immediately before the date of vesting the defendants were not under an obligation to give up possession so that under the compromise they could not

be used validly to have undertaken any obligation to give up their status immediately prior to the date of setting so that under the compromise there was no obligation which could be set up against them.

Mr. Margaret Ayal Brewster, appearing on behalf of the respondents strenuously contended that the words 'the liabilities' used in section 221 referred to every kind of liability which was undertaken by the erstwhile sub-tenant who became an addressee subsequently. His contention was that it certainly included all contractual obligations to which the erstwhile sub-tenant was subject. It is not necessary for our purposes to express an opinion as to whether or not the words 'the liabilities' mentioned in section 221 were or were not wide enough under certain circumstances to include contractual obligations and some liabilities in the nature of contractual obligations, for in the present case we are concerned with a particular type of contractual obligation which was being attempted to be enforced against the defendants. The question therefore is whether the particular obligation which had been undertaken by the defendants in the deed of compromise namely to give up possession voluntarily after the close of 1899 falls, as such a liability as could be enforced against them.

Section 221 speaks of rights and liabilities which the addressee possessed or was subject to in respect of the land on the date immediately preceding the date of setting. Can it be otherwise said that the obligation which the defendants took upon themselves to voluntarily leave the land was in the nature of rights and liabilities which they possessed in respect of the land on the date immediately preceding the date of setting? We do not think it was, for as we see the position we see it to be that immediately after the midnight of the 30th June, 1899, by the coming into force of the Zamindari Abolition and Land Reforms Act and on the making of the setting under the defendants acquired certain statutory rights. These rights were acquired independently of the compromise of the 12th March 1946. The fact that the defendants enjoyed the status of sub-tenants even under the compromise did not make the terms of the compromise any of the rights or liabilities which they

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possession immediately preceding the date of seizure as such seizure. We are of the opinion that the defendants acquired adhesion rights independently of the compromise and the terms of the compromise did not in any manner affect the rights acquired by them under the Zamindari Abolition and Land Reforms Act. Their rights could not therefore be said to be subject to any thing which they had said or undertaken under the compromise.

The question that now arises for determination is that if the defendants were not bound by any declaration which they made to the compromise as a liability under the provisions of section 251 could they be ejected under the provisions of section 258 of the Act? Section 258 of the Act confers the right to eject persons occupying land without any title. The defendants on what we have said above could not be said to have been occupying land without any title. They acquired an interest in the land—an interest created in their favour by the State; namely, they acquired the status of an adhmee which conferred on them rights and liabilities mentioned in section 251 of the Zamindari Abolition and Land Reforms Act. Therefore they could not possibly be deemed to have been persons taking or retaining possession of land otherwise than in accordance with the provisions of the law for the time being in force. They were retaining possession because under the provisions of section 251 they had prescribed to themselves the character and the status of an adhmee and as such under that very section they were entitled to take or retain possession of the land in respect of which they acquired such rights. Section 251 guarantees the continuance of the rights which an adhmee acquires subject of course to the provisions of sections 252, 254 and 257 of the Act. Sections 252 and 257 are not really permanent for our present purposes but section 254 is in so far as that section prescribes the grounds on which an adhmee can be ejected. Section 254 is in these words:

254. *Ejection of adhmee*—Without prejudice to the provisions of section 257, an adhmee shall be liable to ejection from the land held by him—

(a) on the ground that he is in arrears of rent,

(b) on the ground that he has made any trespass of his holding or part thereof, or

(c) for using the land for any purpose not consistent with agriculture, horticulture or animal husbandry which includes pisciculture and poultry farming

and the provisions of Chapter VIII relating to the procedure and forms relating to suits and applications for ejectment on any of the grounds aforesaid shall mutatis mutandis, apply as if the addressee were an owner

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The provisions of the aforesaid section 234, then have indicated that an addressee was liable to ejectment on certain grounds. Sri Harprasad Dopal Srivastava contended that the grounds mentioned in section 234 were not exhaustive. It may be that but nevertheless in his opinion the grounds on which the ejectment of an addressee can be sought have got to be at any rate ejusdem generis the grounds mentioned in section 234. The opening words in section 231 are -except as provided in sections 232, 234 and 235 -which give clear indication of the fact that the ejectment of an addressee could take place only under section 234. In this connection it may be noted that the entire object of the legislature in enacting the U. P. zamindari Abolition and Land Reforms Act and the other pieces of connected or similar legislation was to confer on tenants rights which could not easily be defeated. Thus being the clear intention, and policy underlying the legislation, it would be in our view incorrect to interpret the section in such a way, unless the language of the section forced such interpretation, which would defeat or materially affect the object underlying the legislation.

For the reasons given above we are of the opinion that this second appeal must succeed. We accordingly allow the appeal, set aside the decree of the court below, and dismiss the plaintiffs suit. Under the circumstances of this case, however we are of the opinion that the parties must bear their own costs of the litigation throughout.

Appeal allowed

APPELLATE CIVIL

*Before Mr. Justice H. U. Ray and Mr. Justice
P. D. Bhargava**

1968

March 15.

NAWAB SYED HASAN ALI KHAN (Plaintiff)

v.

NAWAB ASKARI BEGAM alias NAWAB ARA
BEGAM (Defendant)

*Arbitration—Award—Defendant in the alternative—Arbitration
Act (1940) s. 39 excepted—Arbitration Act, 1940 s. 3—Date of
entering an appeal—Order of*

On 11th September 1956 Thana Ali Khan and Askari Begum entered into an agreement by which they appointed Syed Ali Khan as arbitrator to decide on the dispute between them regarding some immovable property left by their mother. The date of agreement also provided that as soon Syed Ali Khan refused to act as an arbitrator Mustafa Zame Hakeem should act as an arbitrator. On 15th October 1956 Syed Ali Khan entered an reference—his next return proceedings in January 1957 but later on he refused to act as an arbitrator. On 15th January 1958 Mustafa Zame Hakeem entered an reference and declared his award on 15th May 1959. On 1st June 1959 an application for filing the award was filed. On 15th August 1959 objections to the award were filed. On 1st March 1960 the trial court rejected the application for the filing of the award holding that the award was given beyond time. An appeal was filed under s. 39 of the Arbitration Act.

Held that the order of the trial court amounted to an order setting aside the award and is appealable.

Jagdish Malhotra v. Jander Malhotra (1) noted on.

Held also that the date of entering on the reference i.e. 15th January 1958 should be the date on which the arbitrator who was to act in the alternative entered on the reference and hence the award given on 15th May 1959 is within time.

First Appeal From Order No. 23 of 1958 against the decree of B. C. Jadhav Civil Judge, Mohandalgery, at Lucknow, dated the 1st March, 1958.

The facts appear in the judgment.

Mauvuddin for the appellants.

M. P. Srivastava for the respondents.

Read at Lucknow

allegedly entered on the reference on the 18th January, 1948, and gave his award on the 15th May, 1948 is within four months of his entering on the reference. The award would, therefore, be clearly within the prescribed period of four months and cannot be thrown out on the ground that it was given beyond limitation.

1948
 January 18th
 May 15th
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 Four months
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 Four months

On behalf of respondent, however, it has been argued before us that the date of entering on the reference should be taken to be the 15th October, 1948, i.e., the date on which Mirza Saqat Ali Khan entered on the reference. No doubt if that is taken to be the date of the starting point of the period of four months prescribed under paragraph 3 cited above, it would have to be held that the award was given beyond the prescribed period. We are, however, of opinion that the correct date for calculating the period of limitation should be the 18th of January, 1948, the date on which Mirza Saqat Ali Khan entered on the reference, and not the 15th October, 1948, the date on which Saqat Ali Khan entered on the reference. In our opinion, the date on which Mirza Saqat Ali Khan entered on the reference should be accepted as taking into consideration the period of four months, because Mirza Saqat Ali Khan when quickly refused to act as an arbitrator. The arbitrations proceedings which took place before Mirza Saqat Ali Khan, therefore, became infructuous. In our opinion, the arbitrators referred to in paragraph 3 of the First Schedule cited above are the arbitrators who refused to make the award. In the present case the arbitrator who made the award was Mirza Saqat Ali Khan and not Mirza Saqat Ali Khan. Hence the date on which Mirza Saqat Ali Khan entered on the reference should be taken to be the relevant date. The argument on behalf of the respondent is that the word used in paragraph 3 is a plural one, i.e., 'the arbitrators', hence it would include all arbitrators, whether they act to act simultaneously or alternately. The argument might have been worthy of consideration if the provision in the award had related to arbitrators who had to act simultaneously. In the present case, however, the arbitrators

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 (Majority
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 By, J.

were to act alternatively. Hence the date of meeting on the reference should be the date on which the arbitrator who was to act in the alternative entered on the reference. For the above reasons, we are of opinion that the judgment of the lower court is erroneous and must be set aside.

We accordingly, allow this appeal, set aside the order of the trial court and remand the case to the trial court for proceeding with the disposal of the case according to law in the light of the observations made by us above. The appellant will be entitled to his costs.

The stay order is discharged.

Appeal allowed

CIVIL REFERENCE

Before Mr. Justice Ray and Mr. Justice P. D. Shergill^a

MESSRS CHHAJJOO RAM MOOL CRANI
 (Applicant)

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 By, H.

STATE (Opposite Party)

Sales Tax—Assessment year and previous year, duration between—U. P. Sales Tax Act, 1948 s. 7, (prior to amendment in 1949) sub-section 2, scope of

Held that it is wrong for the Sales Tax Office to assess the liability of a firm for tax on the basis of its turnover for the assessment year as sub-section 2 of s. 7 of the U. P. Sales Tax Act presently does in assessing the tax in the face of his judgment the Sales Tax Office shall take into consideration the turnover of the dealer for the previous year.

Civil Reference No. 13 of 1950, made by B. R. Varma, Judge, (Revenue Sales Tax, U. P.)

The facts appear in the judgment.

B. N. Ray and An. Extraordinary for the applicant.

The Senior Standing Counsel for the opposite party

Writing at Lucknow

The judgment of the Court was delivered by—

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Sg. 7

Sec. 7. —This is a reference under section 11 of the U. P. Sales Tax Act. The applicants in the case are Chhajpuran Nool Chand, Lalram, Delhi, a firm carrying on business as ferry-connection in Nepal. The head office of the firm is at Delhi. The firm carries on business as carrying timber in the Nepal forests and preparing Railway sleepers, among other things, from it. The sleepers are brought to the railway stations Titraon and Chaudan Chauda, which are situated in Uttar Pradesh. From these stations they are distributed to the various purchasers. The applicants were assessed under the Sales Tax Act for the year 1948-49. A notice under section 11 of the Sales Tax Act was issued to them on the ground that a part of their income had escaped assessment. In response to this notice the applicants produced their account books. These account books were rejected by the Sales Tax Officer who made the assessment on the basis of the best judgment. He also held that the sales of these sleepers were completed at Titraon and Chaudan Chauda and the property in the goods passed to the buyers at those stations. The turnover in the business was, therefore, held to be assessable in Sales Tax Act in Uttar Pradesh.

Aggrieved with the said order the firm filed an appeal before the learned Judge (Appellate). The learned Judge set aside the assessment order and remanded the case for further enquiry in respect of three matters which in his view arose for consideration.

The Commissioner, Sales Tax, then filed an application in revision against the said order of remand. In that revision application the learned Judge (Revision) was of opinion that remand was not necessary and the case should have been decided by the learned Judge (Appellate) on merits. The learned Judge (Appellate) found that the sales at the railway stations were only incidental and were to be treated as complete only on the acceptance of the goods by the purchasers at the station of destination. He further held that, according to the general practice, some railway sleepers were delivered haphazardly at the two railway stations, Titraon and

So far as question no. 1 is concerned, we are of opinion that that reference must be allowed. It may be mentioned that the U. S. Sales Tax Act was amended in the year 1934 and in this particular case we are concerned with the law as it stood prior to the amendment of the said Act by the Amending Act. Section 7 as it stood prior to the amendment in 1934 ran as follows:

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7 (1) Subject to the provisions of section 15, every dealer whose turnover in the previous year is Rs. 12,000 or more in a year shall submit such return or returns of his turnover for the previous year within sixty days of the commencement of the assessment year in such form and verified in such a manner as may be prescribed.

Provided

Provided

(2)

(3) If no return is submitted by the dealer under sub-section (1) within the period prescribed in that behalf, or, if the return submitted by him appears to the assessing authority to be incorrect or incomplete, the assessing authority shall, after making such enquiry as he considers necessary, determine the turnover for the dealer for the previous year to the best of his judgment and assess the tax on the basis thereof.

Provided that before taking action under the sub-section the dealer shall be given a reasonable opportunity of proving the correctness and completeness of any return submitted by him.

Sub-clause (3) of section 7 cited above clearly lays down that in assessing the tax to the best of his judgment the Sales Tax Officer shall take into consideration the turnover of the dealer "for the previous year". In view of the clear provisions of this section, it is difficult to entertain two opinions on the above point, and it must be held that the Sales Tax Officer was wrong in assessing the liability of the firm to tax on the basis of its turnover for the assessment year. It is obvious that for the

s. 327 of the Railway Act and there is accordingly no reason to presume a confidence under Chapter IX and s. 326 of the Penal Code. Moreover the instruction is irrelevant while the offence in question is covered by s. 3 of the Prevention of Corruption Act itself.

Case law discussed.

Criminal Appeal No 20 of 1957 (connected with Criminal Appeal No 21 of 1957) from an order of the Allahabad High Court, (Lucknow Bench), at Lucknow, dated the 14th September, 1955, in Criminal Appeal Nos. 374 and 375 of 1954, arising out of the judgment and order, dated the 28th April, 1954, of the Sessions Judge, Lucknow, in Sessions Trial No. 104 of 1951.

The facts appear in the judgment.

R. L. Agarwal, Senior Advocate (S. N. Agarwal, Advocate, with him) for the appellants in Criminal Appeal No. 20 of 1957.

N. G. Chatterjee, Senior Advocate (D. M. Mukherjee, Advocate, with him) for the appellants in Criminal Appeal No. 21 of 1957.

H. R. Khanna and *R. M. Dhar*, Advocates, for the respondent.

The judgment of the Court was delivered by—

Gajendragadkar, J.—Are the appellants S. Gangoli and P. R. Chaudhri, (hereafter called appellants 1 and 2 respectively), public servants, under section 2 of the Prevention of Corruption Act, 1947, (II of 1947), (hereafter called the Act)? That is the short question which arises for our decision in the present appeal. That question arises in this way.

Chaudhri had been posted as Assistant Permanent Way Inspector, Azamgarh, East Indian Railway, on March, 1946, in the Lucknow E. I. R. Division. Gangoli was posted as Assistant Pay Clerk in the Lucknow E. I. R. Division during the same period. The case against the appellants was that they had committed an offence under section 180-B of the Indian Penal Code and sections 3(2) read with sections 3(1) (c) and 3(1) (d) of the Act. It appears that in accordance with the Pay Commission's Report a sum of Rs. 16,486 was entrusted to

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appellant no. 2 by the Railway Department to be distributed among Class IV staff working under appellant no. 1. This payment had to be made in the presence of, and was to be attested by appellant no. 1. According to the prosecution both the appellants had entered into a criminal conspiracy to misappropriate a part of the net government amount entrusted to appellant no. 2 by paying to the respective members of Class IV staff lesser amounts than those to which they were entitled and by making entries in the pay sheets which purported to show that the due amounts had been paid to them. In accordance with this conspiracy payment was made on 11th March, 1948, in a running train between Faisalabad and Chakdala and the entries in the pay sheets show that the whole of the amount of Rs. 10,000 had been paid to 126 employees. The entries also show that the payment had been made by appellant no. 2 and the same had been attested by appellant no. 1. In fact the whole amount had not been disbursed to the employees who as all were paid Rs. 1,000 lbs. In this manner the two appellants had misappropriated the sum of about Rs. 1,500 and had falsified the pay sheets in pursuance of their conspiracy.

Within a few days of the said payment the employees became suspicious because they learnt that persons recruited on the same day had been paid larger amounts as arrears. Thereupon they approached the higher officers and made a complaint to them. They were advised to present their grievances in writing and as a result some of the employees did present applications in writing complaining that they had not received the due payment of their arrears. These representations led to an enquiry and Mr. Dalip Singh in fact recorded some of the statements on 5th and 7th April, 1948. The prosecution alleges that this development alarmed appellant no. 1 and he tried to hush up the matter by calling all the men together and paying them the amounts which had been previously wrongfully deducted from their arrears. It is the prosecution case that on this day three documents were executed, Nos. 8, 10 and 11, which would clearly show that the appellants had committed the offences charged against them.

Both the appellants denied the charge. They pleaded that they had not entered into any conspiracy and it was their suggestion that they had been falsely implicated in the present case. Appellant no. 1 pleaded that the case against him had been started, and false evidence had been secured by H. H. Das with the aid of Shastri because relations between him and Das were not friendly. Appellant no. 2 pleaded that he had been falsely implicated because, contrary to the suggestion of the police, he had refused to implicate appellant no. 1. According to them, the evidence adduced by the prosecution was irrelevant and false, and the documents produced by it were either fabricated or worthless.

In support of its case the prosecution examined 41 witnesses, relied upon the three documents, Exs. 5, 10 and 11, and urged that the charges framed against the appellants were directly established by the said evidence. The learned Sessions Judge at Lucknow who tried the case against the appellants agreed with the unanimous opinion of the jurors and held that the charges framed against the appellants had been proved beyond a reasonable doubt. He accordingly convicted them of the said offences and sentenced appellant no. 1 to suffer rigorous imprisonment for three years and appellant no. 2 to suffer rigorous imprisonment for two years.

The order of examination and answers was challenged by the appellants by preferring appeals at the High Court of Judicature at Allahabad. These appeals, however, failed and the High Court substantially agreed with the conclusions of the learned trial judge. Mr Justice Kinnear who heard these appeals no doubt partly accepted the defence plea and held that Eas was not a reliable witness and that he might have been responsible for the fabrication of Ex. 30. The learned judge also found that Shambhu was known an unreliable witness. Even so it was held that the evidence of gang men was on the whole satisfactory and that the documents Exs 5 and 11 corroborated the oral evidence adduced by the prosecution. In the result the order of conviction and sentence passed against the appellants by the trial judge was confirmed. It is against that order passed by the High Court that the appellants have preferred this appeal.

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levied the present appeals by special laws and the only point which they have raised before us is that their convictions and sentences are illegal because they are not public servants under section 2 of the Act.

Section 2 of the Act provides that for the purposes of that Act public servants means a public servant as defined in section 21 of the Indian Penal Code. It is not disputed that under section 21 the appellants are public servants. The East Indian Railway which has employed the appellants was at the material time owned by the Government of India and managed and run, by it and it is the terms of the appellants had to be judged at the material date solely by reference to section 21 of the Code, there would be no difficulty in holding that they are public servants as defined by the said section.

It is, however, urged that, for determining the status of a railway servant it is necessary to consider section 137 of the Indian Railways Act, 1925, (8 of 1925). It may be recalled that when this Act was passed almost all the railways in India were owned and managed by public limited companies and as such railway servants as defined by section 2 (7) of the Railways Act could not be treated as public servants under section 21 of the Code. After the railways were nationalised and taken over by the Government of India, this position has naturally altered. But prior to the nationalisation of railways, the position was that railway servants as such did not fall under section 21 of the Code. That is why section 137 (1) and (4) purposed to bring them within the definition of public servants contained in the said section. Sub-section (1) of section 137 provides that every railway servant shall be deemed to be a public servant for the purposes of Chapter IX of the Indian Penal Code. The effect of this sub-section is to treat railway servants as public servants under section 21 for the purpose of offences relating to public servants which are dealt with by sections 161 to 171 in Chapter IX of the Code. It is thus clear that the result of this provision was to treat railway servants as public servants even though they did not satisfy the requirements of the definition of section 21. Having provided for the extension of the said

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and cannot be extended beyond the said purposes. What sub-section (4) really provides is that if a railway servant is charged for an offence under the Indian Penal Code and the said offence is outside Chapter IX of that Code, he cannot be treated as a public servant. This subsection does not purport, or intend, to make any provision as respect of offences which are outside the Penal Code. In respect of such offences, neither sub-section (1) nor sub-section (4) of the Railway Act would apply, and the question as to whether railway servants fall within the mischief of the Act must be decided in the light of the provisions of the said Act itself.

Thus when as to the question whether the appellants can be said to be public servants under section 2 of the Act. Section 2, as we have indicated, is in substance a corporation in itself the definition of a public servant contained in section 21 of the Indian Penal Code. There can be no doubt that the effect of section 2 of the Act is that the status of accused persons has to be determined by the application of section 21 of the Indian Penal Code as if the said section had been included in the Act. If that be so, the appellants cannot resist the conclusion that they are public servants under section 2 of the Act. The contention that because section 2 of the Act refers to section 21 of the Indian Penal Code, the bar created by section 137 (4) of the Railway Act would invariably come into operation is unavailing. The said bar can be invoked only if the status of the accused persons is being determined for any purpose of the Code other than those of Chapter IX. In the present case the main offence charged was under the Act and not under the Code, and so section 137 (4) is inapplicable.

With regard to the construction of section 137 (4), there is another consideration which may be indicated. Section 137 (1) brings within the definition of section 21 of the Code railway servants who but for it would not have satisfied the main limb given in section 21. The deeming provision of sub-section (1) would be clearly inappropriate and unnecessary if the railway servants concerned could be treated as public servants under section 21 itself. In other words, railway servants employed by the railway administration could and

conducted by the Government of India, would be public servants under section 21 as well without recourse to the statutory fiction introduced by section 137 (1). Having provided for this statutory fiction by subsection (1), subsection (4) purports to cover the same matter and to deal with the same class of railway servants and it provides that this class of persons shall not be deemed to be public servants except as mentioned in subsection (2).

(2) This negative statutory fiction is only intended to emphasise the fact that persons who are treated as public servants by virtue of subsection (1) can be dealt with only under the provisions of Chapter IX of the Code and no other. Could it have been intended by the Legislature that subsection (4) should exclude the application of the provisions of the Code other than those contained in Chapter IX to railway servants who would be public servants under section 21 without the aid of subsection (1) of section 137? Prima facie such an intention cannot be attributed to the Legislature. It is true that the non obstante clause lends some assistance to the argument of the appellants that with the exception of the provisions of Chapter IX, section 21 of the Code would be inapplicable to railway servants, but the said non obstante clause cannot prima facie be wider in its scope than subsection (1) of the said section. The said non obstante clause has apparently been inserted as abundantia cautela. [*Raj Bahadur Kishore Raj Nath v. Prasad C. Bhatt, Custodian of Evacuee Property* (1)], to clarify the effect of section 137 (1). The two sub-sections introduce a positive and a negative fiction respectively and thereby achieve the same result. However, since we are concerned with the provisions of the Act and not with any provisions of the Code other than Chapter IX, it is unnecessary to pursue this point any further and to express a definite opinion on this aspect of the matter.

We must now refer to the decisions in which our strict view was arrived. The first case on which Mr. Atwood relied is the decision of the Punjab High Court in *Dewan Ram Singh Chaud v. State* (2). In that case the accused were goods clerks employed by the railway and they were being prosecuted on the count of a First Class Magistrate

(1) 1951 S.C.R. 339.

(2) A.C.R. 1954 P.W. 227.

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Court

on charges under section 445 of the Penal Code. It was urged on their behalf that the offences alleged against them were an substantive offences under section 5 of the Act, and that they could be tried by a special judge alone. That is why the High Court was moved for a transfer of the case against them from the court where it was pending to the court of the special judge. From the judgment of the High Court it clearly appears that the learned Advocate General submitted to the court that the prosecution did not propose to frame or prove a charge against the appellants under section 5 of the Act. Therefore, section 2 of the Act did not really fall to be considered by the Court, and so the observations made by DUNN, J. that if the petitioners are not public servants within the meaning of section 51 of the Penal Code, they cannot be called public servants for the purposes of Act 2 of 1947 is clearly wrong. It, however, this observation was intended to be a decision on the point, it must, with respect, be held to be based on a misconstruction of section 187 (4).

Mr. Jagan has also raised our attention to two decisions of this Court—*Ram Krishna v. The State of Delhi* (1) and *C. A. Monson v. The State of Mysore*—(2) which are *prima facie* against his contention. In the first of these two decisions the appellants had been charged under section 130(8) of the Indian Penal Code for criminal conspiracy to cause offence of criminal misconduct punishable under section 5(2) of the Act to be committed by Madan Lal as also under that section read with section 114 of the Code. They had been convicted by the special judge on both the counts and their conviction had been upheld by the High Court. In their appeal, one of the points raised by the appellants was that Madan Lal was not a public servant within the meaning of the Act. It appears that the offence in question had been committed on 29th December, 1951, and the argument was that under sections 187(1) and (4) Madan Lal who was a trading servant could not be held to be a public servant under section 2 of the Act. CHANDRASEKHARA AYYAR, J., who

CHANDRASEKHARA AYYAR, J.

CHANDRASEKHARA AYYAR, J.

delivered the judgment of the Court and section 137 (1) and added that sub-section (4) had been omitted by the amendment of 1855. Thus the learned judge referred to section 2 of the Act and concluded that. The result is that before the amendment railway servants were treated as public servants only for the purpose of Chapter IX of the Indian Penal Code but now as the result of the amendment all railway servants have become public servants not only for the limited purpose but generally under the Provisions of Corruption Act. With respect it may be pointed out that this observation seems to give to the amended provisions of section 137 of the Railways Act retrospective effect. The question of the construction of the relevant sections does not appear to have been fully argued before the Court and it has not been considered. It is nevertheless true that in respect of an offence committed in 1891 Math Lal was held to be a public servant under section 2 of the Act.

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In the case of *Minister* (1) the main point raised before the Court was whether the accused was a public servant under section 21 of the Code and that was considered by the Court in dealing with that question the Court construed section 21 and held that the appeal was an officer within the meaning of section 21 (b) and therefore a public servant within the meaning of section 21. Incidentally reference has been made to the earlier decision of the Court in the case of *Ram Krishna* (2) and it has been observed that the said decision lays down that before the amendment of section 137 of the Railways Act by Act 17 of 1855 railway servants were treated as public servants only for the purpose of Chapter IX of the Indian Penal Code but in any event they were public servants under the Provisions of Corruption Act. With respect this latter statement does not appear to be borne out by the judgment in the case of *Ram Krishna* (2).

Going back to section 2 of the Act once more we must hold that in defining a public servant it states the same

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Rabindra
Chatterjee
J.

definition in section 31 of the Indian Penal Code and under the misappropriation section the appellants unduly rely on public servants. The result is the errors below were made in holding that the appellants could be properly charged and tried for offences under section 3 (2) read with section 3 (1) (c) and section 3 (1) (4) of the Act. The validity of the charge under section 180 B has not been and cannot be challenged.

Mr. Javed for appellant no. 1 and Mr. Chatterjee for appellant no. 2 appealed to us to reduce the sentence passed against their clients. It was urged in support of this plea that though the charge against them was in respect of a large amount of Rs. 1,80,000 evidence had been adduced to prove misappropriation of Rs. 21,600 which is a much smaller amount. We do not think that in the circumstances of this case the actual amount shown to have been misappropriated has a decisive or even a material bearing on the question of sentence. The persons respectively occupied by the appellants the relations between them and the Class IV servants, the method adopted by the appellants in committing the offence and the other circumstances have all been considered by the courts below in passing concurrently the respective orders of sentence against the appellants. In our opinion there is no justification for interfering with the said orders.

The appeals accordingly fail and are dismissed. The appellants to surrender to their bail bonds.

Appeals dismissed

CIVIL REVISION

Before Mr. Justice Garia and Mr. Justice Durrani
RAM JIWAN MISRA AND OTHERS (DEFENDENTS)

JIWAN MISRA AND OTHERS (PLAINTIFFS)

148
 July 31

For Judgment—*Pending suits also on basis stands of plaintiff*
in the first suit—Whether operates as no judgment in subsequent
suits—Code of Civil Procedure 1908 s. 11

A suit for redemption of mortgage was decreed by the trial court, on the ground that the mortgage had not been renewed. The appeal against this was dismissed on the finding, finally that the plaintiff was not the mortgagor of the original mortgage and probably that the mortgage was not established. In the subsequent suit between the same parties and on respect of the same plot.

Held that the finding of the appellate court on the first point in the earlier suit operated as no judgment in the later suit in the proper sequence of the matters in issue, the first point for determination in every case in the facts stands of the plaintiff and the finding therein cannot be said to be incidental or immaterial.

Dunker Lal Patwari v. Piro Lal Marwaha (3) and *Shri Charan Lal v. Raghunath* (2) relied on.

Civil Revision no. 504 of 1950 from an order of Krishna Chandra Srivastava District Judge Banars dated the 15th December 1949.

The facts appear in the judgment.

Advocate Attorned for the appellant.

E. M. Seth for the opposite parties.

The judgment of the Court was delivered by—

GARIA, J. —This is a civil revision which has been referred to a Bench.

The plaintiff brought a suit as successor of the original mortgagor to redeem the mortgage under section 12 of the Agriculturists' Relief Act. In defence to the suit the bar of section 11 of the Code of Civil Procedure was raised.

① A. I. R. 1950 P. C. 40

② (1947) 1 R. 17, 40, 174

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STATE
OF TEXAS,
v.
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Case 1

It appears that there was a previous litigation between parties relating to the very same plot in respect of which another mortgage had been made. The instant suit was in regard to a subsequent mortgage. When the prior suit was heard the trial court held that the mortgage set up in the prior suit was not proved. Upon this finding the prior suit was dismissed. The plaintiff of that suit preferred an appeal and the appellate court reversed two findings in the appellate judgment. The first issue was as to whether plaintiff of that suit was the successor of the original mortgagor. That issue was answered against the plaintiff. The second question that was considered by the appellate court in that suit was whether the mortgage had been proved. The court came to the conclusion, agreeing with the trial court, that the mortgage had not been established. That finding of the appellate court in the previous suit where by the appellate court had held that the plaintiff of that suit was not the successor in interest of the mortgagor who had created the mortgage in that suit, operated as res judicata in the instant suit. It may be stated that in the instant suit also the plaintiff was claiming to be the successor in interest of the original mortgagor, the original mortgagor being the same, both in this suit and in the previous suit. The trial court in the instant suit decided that the suit was barred by res judicata because of the decision on the question of the plaintiff's title to redeem the mortgaged property in the earlier suit. The court below, however, has come to the conclusion that the primary matter which called for consideration in the instant case was whether the mortgage was established and that the question whether the plaintiff of that suit was entitled to maintain the suit, i. e. whether the plaintiff had a locus standi was not directly in issue in the previous suit and the decision of that question was not essential for the disposal of that case, and has held that the finding on locus standi in the earlier suit cannot, therefore, operate as res judicata in the instant suit.

We are, therefore, to consider whether the decision of the court in regard to the plaintiff's right to sue in the previous suit was essential for the disposal of that suit or

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not. Learned counsel for the appellee, has to go to that it was essential and that that question was directly and substantially in issue and that the question whether there was or was not a valid mortgage, was a question which would only arise if the plaintiff on that point established his bona fide as mortgagee in interest of the original mortgage. On the other hand, learned counsel for the respondents has urged that the trial court had disposed of the case on the finding that the mortgage was not established and that in the plaintiff's appeal the court below was not called upon to decide whether the plaintiff had a bona fide to sue or not, if the court below was taking the same view as regard to the establishment of the mortgage as the trial court had taken, and the question is that the decision by the appellate court as regard to the right of the plaintiff as that was to bring a suit was a decision merely incidental and that finding as regard to the right of the plaintiff of that suit to file a suit could not operate as res judicata in this instant case. We have considered the question raised before us carefully. In every case the first material is that the plaintiff establish his bona fide, i.e. his right to bring a suit. If the plaintiff fails to do so the case must be dismissed irrespective of the merits or denials of the other allegations in his plaint. Therefore, in the sequence of things the first step for the plaintiff is to establish his bona fide. That is why in the very first paragraph of every plaint the bona fide of the plaintiff is alleged. Once the plaintiff's right to sue is established, then the other allegations which he makes are to be established by him, and if he succeeds in establishing his allegations, then his suit is decreed. But if his bona fide is not made out, then the suit fails and no other question really arises. We have no doubt that this is the position ordinarily speaking, but learned counsel for the respondents has urged that the situation here is somewhat different and that it is the finding given in the appellate court's judgment in the previous case, which is being sought to be used as res judicata, even though the trial court gave no finding on the issue of plaintiff's right to sue. He contends that the appellate court was not called upon to record any other finding than the finding

1297 in regard to whether the mortgage was duly established
 1298 because the trial court had only recorded that finding and
 1299 had disposed of the suit on that basis.

1300 We may here point out that in the grounds of appeal
 1301 on the previous suit the plaintiff, who had lost the suit,
 1302 himself invited the court to decide the other issues raised
 1303 therein. Secondly, it seems to us that as a matter of a
 1304 mortgage it would not be said that, if a decision was
 1305 given in regard to whether the plaintiff was the owner,
 1306 for in matters of the mortgage, that that finding was over-
 1307 ruled and that the first question as a mortgage was
 1308 merely whether the mortgage is established. No doubt
 1309 a plaintiff as a mortgagee had his redemption asserts that
 1310 there is a mortgage, and that he is either the mortgagee
 1311 or the successor of the mortgagee, but at the same time
 1312 appears as he brings a suit, he must first establish that he
 1313 is the mortgagee or the successor and, that he is called
 1314 upon to do so on the assumption that the mortgage had
 1315 been established. From here he alleges that there is
 1316 a valid mortgage in existence and, in the first instance,
 1317 that prima facie allegations in the plaint may be accepted
 1318 and then the question is as to whether he has a right to
 1319 sue.

In a case where the plaintiff is seeking as successor of
 the mortgagee to redeem the mortgage, it seems very
 difficult to say that the question of his locus standi is of
 secondary importance and the question, whether the
 mortgage has been duly established is of the first impor-
 tance. The two questions in a certain way are inter-
 connected and interlinked and in the present case, we
 cannot say that in the previous suit when the appellate
 court decided to give a finding, both on the questions
 whether the plaintiff is that suit was successor to interest
 of the mortgagee and entitled to bring a mortgage suit
 and whether the mortgage was established, the court was
 taking upon itself the decision of an issue so far as the
 first point was concerned, which did not call for decision.
 No doubt, by the previous appellate judgment there was
 a dismissal of the appeal and, therefore, the decree of the
 first court was not reversed. It is true that the first
 court's decree cannot be said to have been completely

merged in the second court's decision except for purposes of calculation of limitation, as has been pointed out by their Lordships of the Supreme Court in the case of *State of U. P. v. Mohanram Nisch* (1) but notwithstanding the finding which could operate as res judicata is not the finding of the trial court but the finding of the court of appeal and in the appellate judgment most pertinent is looked at. In these circumstances it is necessary for us to see whether the decision of the court of appeal is the first point that the plaintiff had no locus standi did not in point of fact, effectively dispose of the suit, so that the second question, namely, whether the mortgage was fully established became in a sense ancillary.

We think that the court of appeal in the previous case was entitled to record a finding on the question of the locus standi of the plaintiff, as that was despite the fact that the trial court did not do so. Its powers are no less than the powers of the trial court, and inasmuch as it has recorded that finding we think that that finding cannot be ignored because the suit really could be dismissed on that finding alone, and the second finding in regard to whether the mortgage was established was, in a sense, not absolutely essential for decision for the disposal of the suit. We do not think that the appellate court is debarred from considering all the points that arise in the case, and if it has done so, then its judgment must be looked at to see which finding is of the first importance from the point of view of sequence. If the finding is on the first point in sequence and is capable of finally disposing of the suit, that must be considered to be a finding which in a subsequent litigation would be liable to operate as res judicata.

We are fortified in what we are saying by the decision reported in *Shib Chandra Lal v. Raghu Nisch* (2) where it was pointed out that until the legal representative who was suing had established his title to sue upon the contract, the defendant could not be put to proof of his plea that he was a minor and that the contract was not binding upon him. We may also point out that in the case of *Shankar Lal Pattnay v. Alau Lal Muraria* (3).

(1) A. I. R. 1959-2-34.

(2) (1952) 1 L. R. 17 All. 228-234.

(3) A. I. R. 1959-2-34.

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 Hon.
 James
 Spears,
 J.
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where a court had held that a writ was not maintainable by reason of failure to comply with section 80 of the Civil Procedure Code: the findings given on motion were treated as *obiter* and it was held that these findings did not support the plea of res judicata either in favour of or against the party. We must point out that section 80 says that no suit can be instituted against the Government until the expiry of two months after notice in writing had been delivered and in a case where there is no proof that such a notice had been delivered, the case would fail on the absence of proof irrespective of the fact whether the plaintiff had or had not a good case. The proof of notice in the sequence of allegations required to be proved by the plaintiff would come first; in the same way in the sequence the allegation that the plaintiff had the representative character which he was alleging to mortgage would call for establishment and proof in the first instance before the proof of the mortgage according to law.

After having considered the matter very carefully we are of the view that we must set aside the order of the learned District Judge, dated the 13th December, 1948, and restore that of the trial court. We order accordingly.

Costs will be on the parties.

Resonance allowed.

CIVIL REFERENCE

Before Mr. Justice F. D. Bhargava and Mr. Justice Muneo

MAHARAJA PATESHWARI PRASAD SINGH

(Appellant)

V

STATE (Defendant No. 1)

1959

April 24

United Provinces Agricultural Income Tax Act, 1948 s. 7(1)(a) s. 5 s. 6 s. 7(2) s. 8(2)(b) (a) s. 23 and s. 24

and Rule 17 validity and scope of provisions in an income tax act enacted by the State, scope of—Hospitals as exempt of grant scope of—Communication of the judgment under s. 23 meaning of

United Provinces Agricultural Income Tax Act is a local Act and it will be interpreted in accordance with the following principles of interpretation.

(1) A local Act must be strictly construed and no one can be imposed on the subject without words in the Act clearly and expressly showing an intention to lay a burden upon him.

(2) In case of doubt it should be construed in favour of an interpretation beneficial to the subject and if two constructions are equally possible and reasonable the construction most favourable to the subject must be followed.

(3) Arguments that the law falls within the spirit of law is that an equitable principle can should be supposed any one would like in the taxing authority. Tax and equity are strangers while interpreting a taxing statute.

(4) If there is an ambiguity it must be construed in favour of the subject and strictly construed as against the State.

(5) Such a statute should be interpreted against double taxation but if the statute is enacted to double advantage on a fair reading of the Act, it should be given the benefit of it.

(6) Absence of grant tax within the four corners of the Act would be fatal.

Noted that the word "derived" in s. 7(1)(a) in the U. P. Agricultural Income Tax Act means obtained or received and therefore the Agricultural Income of an assessee should be "the net amount which he actually receives or receives and not what one should get or should have received."

through Lucknow

1995
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 ACT, 1932
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(a) that in respect of charges on the sum advanced by him whether it is collected directly from the owners or through the thesaurier, Section 3 of the Act does not specify that the collection on which collection charges would be allowed should be from the tenants and not from thesaurier.

Further
 (b) that the rule proposed by the old grant deed valid during the previous year should not be included in the Appendix of the amendment year 1932.

(c) that the words "progressive, productive or protective" in the phrase "progressive, productive or protective work amounting to the benefit of the land" in s. 3 (a) and s. 3 (b) (i) are all independent of each other and a work which is either for progressive or productive or protective will be covered by these two sections. Further that the work would be productive or protective rather than a naturally result in such or a work to be rich. It is not necessary that in every case it must result in actual gain. If the work is such that it increases the value of the land it will always be of a productive nature.

(d) that in order to find whether any expenditure comes under the above head in the two sections or not there are two things which are necessary:-

(a) Whether the work is either for the purpose of improvement or productive or protective; and

(b) Whether it was for the benefit of the land. If these two things are present the expenditure would be exempted under this head. Whether it results in actual income or not is immaterial.

(e) that where on a representation of the House of Commons the money was paid for giving certain donations, the State would be prohibited from changing any sum which were such donations which the money has been paid in pursuance of rule 17 framed under U. P. Agricultural Income Tax Act.

(f) that rule 17 framed under the U. P. Agricultural Tax Act was not purporting to have been framed under s. 4 of the Act but it had been made under s. 4 of the Act and it having been laid before the Legislature and having been acted upon bona fide by the council who had derived advantage it is not open to the State to have the law declared ultra vires ultra vires previously so often the past and completed transactions having taken place on the basis of that rule. The money may have been disbursed of no benefit to the subject had occurred and the State had derived unfair benefits by means of the ultra vires rule.

Quoted in: *Quebec Central Railway Co., (1)* continued.

1 (1895) 2 C. R. 404, 501 and 502.

(iii) that an Explanation to rule 12 framed under the U. P. Agricultural Income Tax Act is not to be interpreted and applied independently of the rule and the Explanation to rule 12 is controlled by the rule itself

(iv) that the hospitals which were subject to general supervision by the Civil Surgeon General, be treated as hospitals in receipt of a grant from the Govt. within the meaning of the modification framed under Rule 17 framed under the U. P. Agricultural Income Tax Act

(v) that the two provisions in rules (1) and rule (2) of s. 24 are mutually independent. The power under rule (1) to refer questions and facts can always be construed irrespective of the fact whether any reference has been made under rule (2) or not

(vi) that if an amount is donated to an educational institution recognised by the State e.g. an University, a College or any other school, which is rather recognised by the State Govt. or by any of the local authority then, in that event it would amount to a donation or that institution within the meaning of rule 12 whether it is paid for the purpose of maintenance of the school, for payment of scholarships to students, for other distributions for jubilee celebrations or for any other purpose associated with the institution. But if the amount is paid directly to students who may be the students of a recognised school the donation would not come within the purview of rule 12 framed under the U. P. Agricultural Income Tax Act

(vii) that if the amount has been paid to an institution recognised by the State Govt. or a local authority though not granted the scholarship it would be a donation within the meaning of rule 12 framed under the U. P. Agricultural Income Tax Act but simply because the amount has been paid for scholarship to an institution would not make the institution an aided institution within the meaning of rule 17

(viii) that condition (3) in the schedule of rates is applicable to Part I alone and not to both the parts

(ix) that the knowledge of the order passed by the Revenue Board on the 30th of March, 1954 in relation to applications nos. 149, 150, 151, 152, 153 and 154 of 1953 and so have been derived from a copy of the judgment obtained by the date of the contest, for the Appellate did not amount to compensation to the assessee within the meaning of the word as used in s. 12 of the U. P. Agricultural Income Tax Act and the application for reference consequently is not time barred

Agricultural Income Tax, Reference no. 2 of 1955 for revision of the order of Agricultural Income Tax Board, dated 3rd December, 1952

1955
Mussouri
Punjab
Bihar
Uttar
P
Tax Board

1949 The facts appear in the judgment
 Aggar, Ahmed and B. K. Datta for the applicants
 The Advocate General (K. L. Mehta) and Standing
 Counsel for the opposite party
 The judgment of the Court was delivered by—

V. D. BHOOSARE, J. —These are 18 references under section 24 of the U. P. Agricultural Income Tax Act (Act III of 1949) made by the Board of Agricultural Income tax, U. P. Lucknow. All these references relate to the assessment of the assessee, Mahendra Prasadwan, Prasad Singh of Bahraichpur Estate, district Gonda, in the State of Uttar Pradesh, and they arise out of three accounting years, viz. 1955-1956 and 1957 Fash. The assessee was assessed to a sum of Rs. 7,32,614.7 for the year 1956 Fash on the 23rd June 1949. That was later generally enhanced to a sum of Rs. 8,16,296.8 when it was discovered that the assessee owned some other properties outside the district of Gonda which had escaped assessment. The assessee was assessed to Rs. 9,21,660.14 for 1956 Fash on the 15th October, 1949 and to Rs. 8,13,964.18 for 1957 Fash on the 18th of November, 1950. There was no dispute about enhancement of the assessment made for the year 1956 Fash, but three appeals were filed against the original assessment. On behalf of the State it was prayed that notice for enhancement should be issued, therefore the Commissioner of Agricultural Income tax issued three notices for enhancement with respect to the three appeals.

The three appeals filed by the assessee against his assessment of three accounting years 1955-1956 and 1957 Fash and the three respective notices of enhancement were all disposed of together by the Commissioner on the 26th February 1952. By his order he dismissed all the appeals and enhanced the sum of 1955 Fash from Rs. 6,10,296.8 to Rs. 16,58,618.13, of 1956 Fash from Rs. 9,21,660.14 to Rs. 9,35,127.12 and of 1957 Fash from Rs. 8,13,964.18 to Rs. 8,87,662.15.

Three applications for revision were filed by the assessee under section 22 of the Act to the Agricultural Income tax Board, U. P. for three years accounted as

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These applications were pending and on the occasion on the 8th of April 1953 the Assisting Advocate submitted to Bindings on the matters which had been remanded to it. The six applications filed on the 16th February 1953 for further reference of certain questions and the applications of revision dated the 24th April 1952, were heard together and were disposed of on the 26th March 1954 and on more questions by their order were referred to this Court and they are as follows. They have been numbered as 6 to 11.

(6) Whether the amount spent on repairs and maintenance of pathways and roads in the village of Rikampur Estate are expenses incurred on the construction or maintenance of any irrigation or protective work constructed for the benefit of the land from which agricultural income is derived within the meaning of sections 5(4) and section 6(2) (b) (i) ?

(7) Whether mortgage can be allowed in respect of such expenses under rule 17 ?

(8) Whether the Explanation to rule 17 is controlled by the rule itself or is it to be interpreted and applied independently of the rule ?

(9) Whether the hospitals which were subject to general inspection by the Civil Surgeon can be treated as hospitals in receipt of a grant from the Government within the meaning of the notification issued under rule 17 ?

(10) Whether scholarship paid to students were donations to an institution or fund within the meaning of rule 17 ?

(11) Whether the amount paid to an institution towards scholarship can be treated as donations to the institution within the meaning of rule 17, or can the institution on that ground be treated as an institution aided by the Government within the meaning of rule 17 ?

The 13 references no. 2 of 1953 and nos. 1 to 13 of 1955 arise out of the above questions. The answer was informed by a letter dated the 2nd April 1954 that the

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 IN
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 COLUMBIA

(11) Whether the application for reference was or was not barred by time?

After the statement of the case, this reference has been numbered as 3 of 1858 and which has also been directed by us to be heard along with other references.

We have then before us 13 questions which have to be answered in these 14 references. We propose to deal with them one by one.

Learned counsel for the petition is, at the beginning of his argument had drawn our attention to the fact that Agricultural Income Tax Act is a fiscal Act which lays a burden rather a very heavy burden, upon a subject and therefore, it must be strictly construed and unless there is clear and unambiguous language the tax should not be imposed.

We are conscious of the fact that the Agricultural Income Tax Act is a fiscal Act and there are certain well-known and well-established principles of interpretation which hardly need any authority at the moment and according to which a fiscal statute should be interpreted. For the sake of brevity without making a reference to the authorities they might be stated as follows:

(1) A fiscal Act must be strictly construed and no tax can be imposed on the subject, without words in the Act clearly and expressly showing an intention to lay a burden upon him.

(2) In cases of doubt it should be construed in favour of or beneficial to the subject, and if two constructions are equally possible and reasonable the construction most favourable to the subject must be adopted.

(3) Arguments that the tax falls within the spirit of law or that on equitable grounds tax should be imposed are not available to the Taxing Authority. Tax and equity are strangers while interpreting a taxing statute.

(4) If there is an ambiguity, it must be construed so far as possible in favour of the subject and strictly construed as against the State.

(5) Such a statute should be interpreted against double taxation, but if the statute is construed to double advantage on a fair reading of the Act, it should be given the benefit of it.

(6) Avoidance of increment within the four corners of the Act would be possible.

We will now proceed to deal with the question of law involved.

Question no. 1.—Whether on the facts of the case the assessor is entitled to collection charges on the amount realized from theholders?

This question arises because there are two methods of valuation of rent in the case of the tenants. There are some villages which are known as khams villages and in these villages, it is the agency of the state itself which realizes rent directly from the tenants. But the greater number of villages are not khams villages, but theholders villages, i.e. the state has given certain areas, to certain theholders on payment of certain amounts. The theholders realize the rent and make the payment to the state. The realizations made during the year 1935 from the khams villages amounted to Rs 8,10,584, while the amount realized from the theholders was Rs 20,01,574. The Manager of the estate was asked to send a report as to what would be the gross rental of the theholders villages, and from the report it appears that the gross rental from the theholders was Rs 24,32,219. The Assessing Authority allowed the collection charges on the amount of rent which had been realized directly from the tenants in the khams villages, but disallowed collection charges on the amount, which had been realized from the theholders, but it gave no reasons for disallowing the amount. In appeal the Commissioner affirmed the order of the Assessing Authority and the reasons given by the Commissioner, inter alia, were that the assessor had actually incurred no expenses in collection charges in collecting money from the theholders; that the estate had taken security from the theholders merely in cash and no interest was paid on that cash security and the payments of the theholders money was more than secured under the terms of the contract, that the

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difference between the gross rental, i.e., Rs 24,32,100 and the actual payment to the assessee by the Chokkadam, i.e., Rs 23,81,874 represents the commission, and that payment of commission to the Chokkadam was in fact collusive charges which were to the tune of about 15 per cent and the assessee had already benefited by it and, therefore, no further collusive charges should be allowed.

When the matter was raised before the Board it was asked the question in detail. After giving the facts about it and also the relevant portion of the *thakidana* and the provisions of the U. P. Tenancy Act, they were of the opinion that the laws in favour of the *thakidana* gave them the right to collect rent, and, they were exercised in consideration of the rent reserved therein. They also held that suits for recovery of rent from such *thakidana* could be in the revenue court only, and, therefore they were of the opinion that the amounts actually realized from the *thakidana* was the rent realized under section 5 and the amounts was entitled to collection charges thereon. The Board did not agree with the remark of the Commissioner that no expenses had normally been incurred in the collection of the *thakidana* money, and that it represented the net amount minus the collection charges. The Board came to the conclusion that there was nothing in support of this conclusion on the record. The estate had to maintain a well paid staff for realizing money even from the *thakidana*. The number of such *thakidana* was fairly large and there was nothing to show that they themselves came forward regularly to make payments and it appeared that even when the arrears of rent had to be realized. On these grounds they held that collection charges over that amount should be allowed and it is with that opinion that this reference has come to us.

Learned counsel for the nation has argued that he was entitled to the collection charges on that amount also.

Section 2 (1)(a) defines "agricultural income", which has been taken from the Indian Income Tax Act of 1922.

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- (4) any rent or revenue derived from land which is used for agricultural purposes and is either

assessd to land revenue in the U. P. or is subject to a local tax or cess assessd and collected by an officer of the Provincial Government.

1900
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Expenditure
Revenue
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Other
Total
1901
Assessment
Expenditure
Revenue
Interest
Other
Total

We are concerned only with the word 'derived'. The word 'derived', according to dictionary, means 'to come to exist', 'to draw', 'to fetch', 'to obtain', 'to get' (from a source or with a source). This clearly means that whatever had been actually obtained or got or received, that would be the income and not what one should get or should have realized. By no stretch of the language it can be said that the assesses 'fetched', 'drew', 'obtained', 'got' or 'received' from the land which was under the *chakadars* system more than Rs 20,00,000 odd which is alleged to have been realized by him from the *chakadars*. Under section 2 (1) (a) therefore, the agricultural income would be deemed to be rupees twenty lacs and odd. The word 'derived' further has been explained in section 5 of the Act, where it has been stated that the agricultural income mentioned in clause (a) of sub-section (1) of section 2 shall be deemed to be the sum realized in the previous year on account of agricultural income mentioned in the said clause (a). Therefore, by section 5 the meaning that has been given to it is the sum actually realized. The word used is 'realized' and not 'realizable'. Therefore, the agricultural income of an assesses would be that net amount which he actually realizes or receives and in that case, it is not disputed that the amount that had been realized by the assesses from the *chakadar* villages was anything more than Rs 20,01,574.

Before proceeding further with the discussion of the case, the exact nature of the contract on which the *chakars* were given may also be mentioned here.

There is a standard form of *chakars* which was in vogue in the courts for a long time. The assesses at one time was under the management of the Court of Wards and the Deputy Commissioner of Gonda was the Manager and the forms are coming in use since then. We have got prepared a translation of that *chakars* form. The *chakars* is in behalf of the assesses on one side and the *chakadar*

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1959
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Monsieur, J.

any was an application specified in the Fourth Schedule, which may be brought by a tenant against a landlord or by a landlord against a tenant shall be deemed to be included in that Schedule under the same serial number as such similar was an application. Again under section 214 among the grounds on which a tenant is liable to be evicted is the ground that a decree against him for arrears of rent remains unsatisfied. It was argued that what a landlord pays is that also rent and a decree for non payment of the rents money would be deemed to be a decree for rent and, therefore, what had been realized from the deductions was really nothing else than rent and if it was rent, there seems to be no reason why, for the realization of that collection charges should not be allowed.

It was argued that the reasons given by the Comptroller for disallowing this amount are no reasons at law. An amount is retained by virtue of sections 5(3) of the Act as collection charges on the rent realized in the previous year as the rent monetary charges. He is not bound to give details of the expenditure. Whether he has incurred more than the statutory allowance or less is immaterial. He has been given a statutory compass up to that rate, and even if he had not produced any account, showing that he had incurred any expenditure on the rent realized, he should have been allowed collection charges. We think that the argument of the learned counsel is well founded. If the clear and specific words of the statute say that a deduction of collection charges on the rent realized shall be allowed, and that allowance is not dependent on the actual expenses we do not think how the taxing authority can ask for details of the accounts. Moreover, it appears that while the case was before the assessing officer he never asked for any details of these accounts. Before the Commissioner the accounts books had been produced and several officers of the revenue had also been examined, but no record, whatsoever, was kept of the examination of the records and of the witnesses. Therefore, an affidavit was filed before the Board by the general agent of the assessee, wherein details were given about the expenses and it was mentioned therein that actually a sum of Rs 2,65,000 had

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We have already said that when the statute does not require that the tenant is to give details of the collection charges, nor is it open to the assessing officer to allow more or less than the percentage given in section 4, the tenant was not bound to supply the details of the expenses incurred by him, and even if there were no expenses the assessing officer was bound to allow collection charges at the specified rates.

The argument of the Commissioner that since security had to be demanded from the tenant, the collection charges were disallowed does not appear to be correct. Under the statute it was only those disallowed from whom the Manager chose to demand security, not all who were to deposit security, and even if security was taken, that did not deprive the tenant of the collection charges. Allowance of collection charges is not dependent on the fact whether collection is secured or not.

Learned Counsel for the State has argued that commission which had been paid was actually the collection charges and therefore if once the tenant has got benefit of the collection charges, he should not be given double benefit. We are unable to agree with this argument. As we have given a prima facie view of the relevant portion of the statute, we do not think that there is any question of any commission. It may be that the tenant by giving the details was content with receiving a lesser amount though a larger amount. The extra amount if any charged by the landlord would not be the collection charges. It may be that some of the portion may remain uncollected. If there is a shortage of land up to 70 per cent be allowed, the landlord was to suffer. Therefore to fill the difference between the gross rental realisable from the tenant and the amount paid by the tenant to the landlord, a commission or a collection charge is a reasonable. The tenant may have thought that if he makes collection himself, he may have to make far greater expense than in getting the collections made through the landlord. As a matter of fact it had happened that when the collections have been made directly from the tenant, they have been much less than what they had been when made through the landlord.

In the year 1350 Pash the total collections from the Chav villages and from the Chakladar villages came to Rs.28,22,087 while in the years 1356 Pash and 1357 Pash they were Rs.29,23,251 and Rs.28,22,040 respectively. In the latter two years the collections had not been made through Chakladars but were made directly. Thus in one year about seventy thousand rupees and in the other about fifty thousand rupees less were realized.

1928
Minimum Permissible Chakladar Share
1
Two-thirds
75%
Respectively

We have already held that what the Chakladar keeps as their profits was not the collection charges so far as the tenant is concerned but even if, for argument's sake we accept that these were the collection charges which had been paid by the tenant, he would under section 5, be entitled to claim collection charges on the amount realized by him even though a right amount is double advantage. Under a taxing statute, an assessee cannot be deprived of the advantage if he can have on the workings of the Act, even if it results in such an advantage. It is only, if a result is double advantage, that the law is to be interpreted very strictly and there should be a presumption that the law never intended to cut an assessee doubly.

After considering all the facts of the present case and the clear and unequivocal workings of section 5 we are clearly of the opinion that an assessee is entitled to collection charges on the sum realized by him, whether it is realized directly from the tenants or through the Chakladars. Section 5 does not specify that the realisations on which collection charges would be allowed should be from the tenants and not from the Chakladars. If we were to import the words 'from tenants, after the words 'the sum realized', we will be importing something which is not in the section and stretching the language in favour of the State which we are not entitled to do in a case of fiscal legislation. Even if both the interpretations were possible which we do not think is possible under the clear and explicit language of the section, we would be inclined to give an interpretation which was in favour of the subject rather than in favour of the State.

We accordingly answer this point in the affirmative.

1938
 Income
 Tax Return of
 Farmer
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Question no. 3—Whether the sale proceeds amounting to Rs. 27,419 9 8 of the old grain stock sold during the previous year be included in the agricultural income of the assessee, year 1938. Facts?

There was grain, worth the above amount, lying in the stock of the assessee in the beginning of the year. When the return was filed the grain was included in the item submitted by the assessee, but later on he made an application that since the produce was of the last year, he was not liable to pay any income tax over the sale of this produce. The Assessing Officer allowed the prayer of the assessee and excluded Rs. 27,419 9 8 from the sale proceeds of the year 1938. Facts. Before the Commissioner an objection was taken on behalf of the State that this should not have been excluded. Originally the figure under section 4(2)(b) was Rs. 2,25,765 6 8 but subsequently this figure was changed to Rs. 1,98,345 12 8 on the ground that a sum of Rs. 27,419 9 8 had been wrongly included for the price of the old grain stock in hand. The Commissioner held that the Deputy Commissioner, i.e. the Assessing Officer, had accepted the subsequent figure without giving any reasons for it, and he did not agree with the Assessing Officer that the subsequent figure should be taken to be as the gross income under this head. He was of the opinion that even accepting the statement of the general agent, the sum of Rs. 27,419 9 8 still remained an income under section 4(2)(b). This was brought from the last year and prior to 1938. Facts there was no tax, therefore, no tax had been paid on this amount and tax should be paid in 1938. Facts on the agricultural income also. When the matter went up before the Board, the Board agreed with the opinion of the learned Commissioner that the amount in dispute should be added. On behalf of the assessee it has been argued that the opinion of the Commissioner and the Board is incorrect. It has been contended that under section 4(a) is only the produce of that year which is liable to tax, and it is also the expenses of that year which are allowed. In the present case so far as the expenses incurred for earning Rs. 27,000 odd of the previous year are concerned, they would not

148 This point is quite clear from sub-section (3) of section 8 which reads as follows:

Minimum
Produce to
be sold
for
the State
of P. &
Rajasthan, 2

If the assessing authority is satisfied that the proceeds of sale have not been correctly shown by the assessor or that any portion of the produce has not actually been sold, he may assess the value of the produce for purposes of clause (b) of sub-section (1) of section 8 by determining, in the best of his judgment, the amount of produce and the market value thereof.

This section clearly shows if part of the produce has been sold the value of that produce will be taken as income, and as regards the balance the assessing authority shall determine the value in the best of his judgment. In case no sales have been effected, it will be the value of the total produce according to the best judgment. If the whole produce of the year has been sold, and the assessing authority is of the opinion that the amount shown is correct, then the sale proceeds of the total produce of that year would be taken to be the assessed as profit. Rule 18 of the U. P. Agricultural Income-tax Rules can be used in support of the above proposition, which runs as follows:

18. In determining the amount of produce and the market value thereof under sub-section (3) of section 8 the assessing authority may take into consideration:

- (i) the account books, if any, kept by the assessor in the regular course of business;
- (ii) the average yield for the crop reported in neighbouring areas, having regard to the class of soil and the situation thereof;
- (iii) the average prices during the year for each produce in the nearest market.

From the above rule, it is apparent that what the Legislature wanted was the value of the yield of the assessing year and it was not the actual sales which were to be taken into consideration.

We are, therefore, clearly of the opinion that the Commissioner has erred in including this amount in the total agricultural income of the estate and this amount should be excluded. The opinion of the Board when it agreed with the Commissioner was also correct.

We would therefore, answer the question in the negative.

Questions 3 and 5—The third and the sixth questions which have been referred to us appear to be connected and both of them are on the interpretation of section 3 (f) of the Act. These questions are

(3) (a) Whether the tube wells and other works, non-works were constructed by the assessee for the benefit of the land?

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(3) Whether the amount spent on repairs and maintenance of pathways and roads on the slope of Badmington Estate are expenses incurred on the construction or maintenance of any irrigation productive or protective work constructed for the benefit of the land from which agricultural income is derived, within the meaning of section 5 (d) and section 8 (2) (iii) of 1922.

The relevant portions of section 5 of the Agricultural Income Tax Act read as follows:

3. The agricultural income shall be deemed to be the sum realized after making the following deductions:

(4) any expense incurred in the previous year on the construction or maintenance of any irrigation, productive or protective work constructed for the benefit of the land from which such agricultural income is derived;

There is a very similar provision in section 5 of the Act and on the basis of that, actually question no. 6 arises. The relevant numbers of section 5 is as follows:

6(3) The income shall be the gross proceeds of sale of all the produce of the land subject to the following deductions:

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SOCIETY OF
PLASTIC SURGEONS

the opinion of the Commissioner the words "productive or protective" were qualifying words for the word "irrigation." Since the R₁ was also charging for the water supplied by them through their canals, therefore, it was said that it was more of a business nature than an agricultural income. The Commissioner was further of opinion that as a matter of fact, these constructions have not in any way increased the rent, and therefore, it could not be said to be productive and, lastly, he had held that once such work should be interpreted to benefit both the landlord and the land, and if the landlord has not been benefited thereby it could not be said to be a productive work. The Board gave its opinion in favour of the tenant and has come to the conclusion that they are of productive and protective nature. According to them what was necessary was that such work, even if it is for irrigation purpose only, must be for the benefit of the land, from which agricultural income is derived, and as it was not disputed that the tenants used to take water for irrigating their fields, therefore, it necessarily followed that it was for the benefit of the land. The Board was also of the opinion that the words "productive or protective" were not the words qualifying "irrigation," but they are separate words which qualify the word "work." They were of the opinion that it was unnecessary for the purpose of this case to go into the question, whether there was actually any increase in rent on account of such irrigation facilities.

What we have to consider is whether the works were for the benefit of the land.

As regards payment which are involved in question no. 5 a sum of Rs 57,457 1/2 had been spent, which was allowed by the assessing authority, but was disallowed by the Commissioner and has also been disallowed by the Board on the ground that these constructions were not of the nature as specified in section 1 (d) or in section 5 (2) (b) (c). On behalf of the income tax authorities it was urged that there being no comma between the word "irrigation" and the words "productive or protective", it should be deemed that the words "productive or protective" are qualifying words for "irrigation" and

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work executed by the kishangs on his residential buildings or on non-agricultural land, would again be a productive and protective work for the benefit of the land. If roads are constructed or maintained, there is always better means of transport and greater facilities to the tenants for carrying manure, ploughs to their fields and their produce from the fields. These roads further when constructed make the entire line liable to attack from wild animals. As we have said earlier in this judgment, the estate extends to over 1,500 sq. miles and there are good many villages, which are in the interior and access to them is also dangerous. Therefore, the roads and pathways, which have been constructed and maintained, could be for no other purpose but for the benefit of the land.

In order to find out whether any expenditure comes under this head or not, there are two things which are necessary: (i) whether the work is either for the purpose of improvement or productive and protective, and (ii) whether it was for the benefit of the land, i.e., whether it increases or tends to increase the utility and the value of the land. If these two things are present in one system, the expenditure would be exempted under this head, whether it results in extra income or not is immaterial.

We, therefore, agree with the opinion of the Board on question no. 5 and disagree on question no. 6 and we would answer both parts of question no. 5 and question no. 6 in the affirmative.

Questions 6 and 7 to 11—Questions no. 6 and questions nos. 7 to 11 all relate to rule 15 of the Rules framed by the State Governments under section 84 of the Agricultural Income Tax Act. Therefore, we propose to take all these questions together.

These questions are:

(6) Whether rule 15 framed under the Agricultural Income Tax Act goes beyond the scope of section 8 and is ultra vires?

(7) Whether companies can be allowed in respect of such expenses under rule 15?

(8) Whether the Explanation to rule 15 is controlled by the rule itself or is to be interpreted and applied independently of the rule?

(9) Whether the hospitals which were subject to general inspection by the Civil Surgeon can be treated as hospitals in receipt of a grant from the Government within the meaning of the notification issued under rule 17?

(10) Whether scholarships paid to students were donations in an institution or fund within the meaning of rule 17?

(11) Whether the amount paid to an institution earmarked for scholarship can be treated as donation in the institution within the meaning of rule 17, or can the transaction on this ground be treated as an institution aided by the Government within the meaning of rule 17?

1928
Muzaffar
Khan, J.
D. D.
Sargani, J.
The State

The amounts claimed donations under this rule in the year of Rs 4,39,768 11 8 in the year 1925 Fadh, Rs 3,25,146 in the year 1926 Fadh and Rs 2,41,135 in the year (or) 1927 Fadh. The assessing authority had allowed a sum of Rs 1,25,145, Rs 2,65,558 and Rs 1,43,485 in the three respective years. When an appeal was filed by the assessee against the assessment order the Officer on special duty, on behalf of the Agricultural Income tax authorities, raised objection to the different sums of donations allowed. After considering these objections the Commissioner allowed Rs 1,25,787 1 8, Rs 2,65,525 8 6 and Rs 1,27,847 2 8 in the respective years. Before the Board again objections of the Officer on special duty were joined and after considering the arguments, the Board remanded the matter, after giving certain directions to the assessing authority. After the receipt of the findings on remand the Board considered and allowed Rs 39,768 11 8, Rs 35,304 22 8 and Rs 41,373 1 1 for the three years 1925, 1926 and 1927 Fadh respectively and disallowed the balance. On these findings the assessee raised certain questions which are the questions referred to above under this head.

Before the Board the first issue on behalf of the State as was urged, that rule 17 was beyond the scope

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 v. BOARD OF
 TRADING
 (The Board
 of Trade
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of the rule making power of the State and, therefore, it was ultra vires, and on that ground it was contended that any donation of any kind whatsoever could not be exempted. The Board has not expressed any opinion on this question and has merely contended itself by saying that it found itself in a difficult position, particularly in view of the fact that exemptions in accordance with rule 17 had been allowed to all the taxpayers without any objection by the State. The question being one of law, they have therefore referred it to this Court and this question no. 8 has been referred to this Court about the validity of this rule.

It was argued on behalf of the assessee that we should answer the question in the negative. It was contended, *inter alia*, that this point should not have been allowed to be raised by the State for the first time before the Board, and secondly, in any event, it is void under section 24. It was also contended that since it is the action of the State on account of which these donations had been paid and the assessee would suffer a loss on account of the action of the State itself and therefore an exemption should be put on the vote of the assessees, which would result in lesser injustice to the assessee.

Learned counsel has placed reliance on the case of *T. S. Narayan v. The Regional Transport Authority, Tanjore* (5). It was a case under the Motor Vehicles Act, wherein a rule had been framed about certain fees and the question was whether the Motor Vehicles Act permitted the framing of such rules. Under Chapter IV of the Motor Vehicles Act the Provincial Government was invested with preliminary powers to make rules for carrying out the purpose of that Chapter. The purpose of the Chapter was the control of transport vehicles. Again section 80(2)(c) had clearly contemplated three default situations. It prohibited the picking up or setting down of passengers at specified places, in specified areas and at places other than duly notified stands or halting places. On these facts their Lordships of the Supreme Court held, that since

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usually in the enabling section. The first power, according to us had been given in sub-rule (1). And the second under sub-rule (2). We are unable to agree with the argument of the learned counsel for the assesse that the first power also includes the power, which would affect the substantive right of the person.

There cannot be any doubt that rule 17 cannot be called a procedural rule. It excepts certain incomes from being taxed. If, for example, a certain income which was not taxable under the Agricultural Income Tax Act, was made taxable objection could be made that it had affected vested rights. Similarly, if there is no exemption provided and an exemption is added by the rule, it will also affect the right of the other party and there would be a conflict in the right of the assesse.

It is well settled principle of constitutional law that a legislature cannot delegate its essential functions. The legislative policy regarding a legislature must be clearly and expressly explained in the statute itself, but when such powers are delegated, they should be circumscribed and be within limits. Certain details, e.g., fixing the maximum rate of imposition of a tax, authorising the executive to determine the tax or water rate for the supply of water, irrigation, etc., can all be delegated to a sub-ordinate authority. Here it is stated that so far as sub-section (1) is concerned, no sub-clause of that section can be used for the purpose that rule 17 had been framed under that clause. No clause covers it. Therefore, the counsel for the assesse had to rely on sub-section (2), which, as we have already said, would not apply to a rule like rule 17, which, in our opinion, is not a procedural law for carrying out the purposes of the Act.

Lastly, it was urged that at this stage since the rule had been placed before the Legislature and the assesse relying upon that representation had reserved those expenses, some of those expenses being also connected with the Government, therefore, all the past actions, under the bona fide belief that the law was *extra vires*, should not be allowed to be touched. It was contended by the assesse that if this rule had not been framed it

may be that the answer would not have occurred some of these experiments. The same was greatly placed on the fact that since these rules had been placed, as required by subsection (3) of section 44, before the Legislature, and there was no amendment or modification by the Legislature therefore, they should be deemed to have been passed with the approval of the Legislature.

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Maxwell as has well known back on. The interpretation of Statute 25th Edition at page 50 has observed as follows:

Instruments made under an Act which prescribes that they shall be laid before Parliament for a prescribed number of days, during which period they may be annulled by a resolution of either House, but that if not so annulled they are to be of the same effect as if contained in the Act, and are to be judicially noticed, must be treated for all purposes of construction or obligation as otherwise, exactly as if they were in the Act. If there is a conflict however out of these instruments and a section of the Act, it must be dealt with in the same spirit as a conflict between two sections of the Act would be dealt with.

Therefore, it was argued that the rules having not been amended by the Legislature, they should be deemed to be a part of the Act.

It is true, that if a rule or regulation, properly made, had been laid before the Legislature, it would take effect, as if it were a part of the Act, and it will have the same authority or force as any other statute of the Act. But if the rule itself was beyond the competence of the rule-making authority, in that event, should remedy be given to the rule, is the real question that arises in the present case. We think that, strictly speaking, that would not be reasonable.

Though it may be so, yet there are certain considerations, on account of which, we think that in the present case, we should deem it that this legislation had been a proper legislation, all it is declared *ultra vires* and any benefit that had accrued before that date as an assurance

could not be taken away from him. We will deal with these considerations later.

The reference on this question has been made in this court under a wrong apprehension. The Board considered that the exemption section in the Act was section 5. That section is not a section which exempts a certain income of an assessee. It is a section of "exclusion", i. e., the income derived from a property held under trust or other legal obligation would not be taxable at all. In other words, when a property is held by such a trust, the trust is not liable to pay any income tax and would not be an assessee at all. Therefore such a trust has been excluded entirely from the purview of the Agricultural Income Tax Act. Exemptions, which are really exemptions, have been mentioned in sections 3 and 6 themselves. Therefore, so far as rule 17 is concerned, it was neither framed under section 3, nor has it any affinity to that section.

Quoted in his book, *The Construction of Statutes*, 1913 Edition, at page 253 has observed as follows:

Where a certain contemporaneous construction has been placed upon an ambiguous statute by the executive or administrative officers, who are charged with executing the statute, and especially if such construction has been observed and acted upon for a long period of time, and generally or uniformly acquiesced in, it will not be disregarded by the courts, except for the most satisfactory, cogent or unpeeling reasons. In other words, the administrative construction generally should be clearly wrong before it is overturned. Such a construction commonly referred to as practical construction, although not controlling, is nevertheless accorded a considerable weight. It is highly persuasive.

And where vested rights have grown up under the departmental construction, the courts are particularly in being more reluctant than in ordinary cases in adopting a construction which will destroy or disturb such rights. A similar reluctance is also proper where a departure from the executive interpretation will result in injustice.

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It is on the principle enunciated above that we feel reluctant in declaring at this stage a rule as *ultra vires*, which has been made by the Government and which has been acted upon for a considerable length of time and has also been applied in the case of every other assessor, and, which, if declared *ultra vires*, would result in great injustice to the private assessor, and under the circumstances, we are inclined to take the view that as, on a representation of the State Government, the assessor used *bona fide* in paying certain donations, the State would be precluded from charging any income tax over such donations, which the assessor has *bona fide* paid in pursuance of rule 17. This interpretation is in no way inconsistent with any part of the Act. The declaration of the rule *ultra vires* at this stage would be very hard and oppressive to the assessor.

Learned counsel for the assessor had relied on *Corporation of the City of Quebec v. Quebec Central Railway Co.* (1). That was a case where on a wrong representation made by a company, the Parliament had passed a certain law and the court held, that, in those circumstances, since the law had been brought about on a wrong representation by the company, therefore, the company could not be allowed to say that the law was wrong or *ultra vires*. To a certain extent, this authority supports the proposition of the assessor, that the State Government should not now be allowed to raise the plea of *ultra vires*, when it is on its own representation, that rule 17 was framed. But there is also a little difference. There in the Canadian case, misrepresentation was in a certain fact, but here if the point has been construed it has been construed under a mistaken view of the law. If in the present case, it was the misrepresentation of the fact alone, then section 113 of the Evidence Act would have applied and we would have not allowed that point to be raised by the State at all.

In the Tagore Law Lectures Sir S. R. Das's Law of *ultra vires* in British India, at page 392 it has been commented:

"When *ultra vires* transactions have been completed, then, as between parties to them and the

(1) 1884, 10 C. R. of Canada, 442, 443 and 444.

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corporation, the matter is absolutely settled for all purposes and no further claim can exist on the part of the one against the other."

It was contended that here so far as the purpose of decisions under that alien-ware rule having been made and the transactions completed were concerned, at this stage the State should be bound. We agree with this contention.

Then, in our opinion, if a rule has been made by the State purporting to be within its power for the benefit of the subject, and acting on the basis of which the subject has received calculation and settled himself to a benefit, that State on its own motion cannot ask the court to have the law declared, here on its alien-ware. The law, in that event, should be interpreted as drawn of the subject and in a way that least injustice results from its interpretation. Therefore, so far as the past transaction is concerned the rule would be deemed to be effective.

We would answer question no. 4 not in the simple affirmative or negative but we would say that rule 17 was not purported to have been framed under section 8 but it had been made under section 44 and it having been laid before the Legislature and having been acted upon long file by the assessor, who had derived advantage, it is not now open to the State to have the law declared alien-ware retrospectively to affect the past and completed transactions having taken place on the basis of that rule. The answer may have been different if no benefit to the subject had accrued and the State had derived undue benefit by means of the alien-ware rule.

Question no. 5 appears to refer to expenses mentioned in question no. 6. We have already held that repairs and maintenance of pathways and such could be allowed under section 5 (d), and section 6 (2) (3) (c) and there fore, question no. 5 does not need any further answer.

Question no. 8 relates to the scope of rule 17. Rule 17 reads as follows:

17. Sums paid by an assessor as damages to any structure or fund which is established as Unwar

Prudently for a charitable purpose and is approved by the State Government for the purpose of the rule shall be exempt from liability to agricultural income tax.

Provided that the total of the sums so paid is not less than Rs 250.

Provided further that nothing in this rule shall be deemed to exclude a person or class any exemption in respect of any sum referred to in this rule if it was exempted from income tax under the Income Tax Act, 1922.

Explanation—In this rule charitable purpose includes relief of the poor, education, medical relief and the advancement of any object of general public utility.

The assent wants to interpret this rule to mean that in order to avail of the advantage of this a fund or institution to which a donation is given should be either charitable as explained in the Explanation or approved by the State Government. Therefore, even if a school, a hospital or any other charitable institution is not recognized by the State Government or approved by it for the purpose of this rule, it could be included in rule IV.

It was contended that the word *and* in the rule can be read as *or* and there is ample authority for the proposition that the word *and* and *or* are interchangeable and reliance was placed on Maxwell's Interpretation of Statutes, 18th Edition, page 228, where it was observed:

To carry out the intention of the legislature, it is occasionally found necessary to read the conjunction *or* and *and* and vice versa for the other.

The same author at page 228 has also observed:

This substitution of conjunctions, however, has been sometimes made without sufficient reason, and it has been doubted whether some of the cases of carrying *or* into *and* and *and* into *or* have not gone to the extreme limit of interpretation.

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MILWAUKEE JOURNAL
JANUARY 1929
V. D.
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1959 *Rehman* was also placed on Crawford's book. The construction of *Rehman*, 1940 Edition, page 325 paragraph 126

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In ordinary use the word 'or' is a disjunctive that marks an alternative which generally corresponds to the word 'either'. In fact of this meaning, however, the word 'or' and the word 'and' are often used interchangeably. As a result of this and care less use of the two words in legislation, there are occasions when the court, through construction, may change one to the other.

But Crawford in the same paragraph observes:

This cannot be done if the statute's meaning is clear or if the disjunctive operates to change the meaning of the law. It is proper only in order to more accurately express or to carry out the obvious intent of the legislature, when the statute itself furnishes cogent proof of the error of the legislature and especially where it will avoid absurd or impossible consequences or operate to harmonize the statute and give effect to all of its provisions.

In our opinion and should be read as 'and' and 'or' as 'or' ordinarily and unless there are strong and sufficient reasons to read one for the other, it is not open to a court to treat them as synonymous. And it is said generally in a comparative or cumulative sense requiring the fulfillment of all, the confluence that it joins together, while 'or' is a disjunctive conjunction equivalent to the word 'either' and is antithetical of 'and'. We do not think that in the present case any such reason exists. Nor is there any rule of grammar, because of which we should make this change, nor would it be inconsistent with the scheme of the Act. If we strictly follow the dictionary meaning of the word 'and' instead of being destructive of the object of the enactment it would really be in consonance with its purpose. We, therefore, cannot accept the argument of the learned counsel for the interest that the word 'and' should be read as 'or'.

It was argued that if it was not so, why an Explanation was at all added. The Explanation began with words in that rule. Therefore instead of the words charitable purpose in the rule we should take into the definition of charitable purpose as given in the Explanation. To our mind there may be some doubts about the charitable nature of some of the institutions which are for education, medical relief or for the advancement of any object of general public utility, and therefore in order to make it clear the Explanation was added. It appears that it was added merely for the guidance of the State Governments when giving approval under rule 17 to an institution or to a fund. If we were to accept the argument of the learned counsel for the assent that a charitable purpose need not be approved by the State Government, then the words 'and approved by the State Government' for the purpose of the rule would be redundant unless we are to suppose that it was open to the State Governments to approve some fund or institution which was not at all for a charitable purpose. A law should be so interpreted that it should not impinge redundancy to the Legislature or to the rule making authority.

It was also argued that the words 'approved by the State Government' refer only to a fund and not to an institution because the words institution and fund were separated by the disjunctive 'or'. We are unable to accept this argument. In that event, even the words charitable purpose would govern only 'fund' and if we were to accept the argument of the learned counsel, it would mean that any donation can be paid to any institution of any kind whatsoever whether it was charitable or not and it was only when it was paid to a fund that it should have been established in Uttar Pradesh for a charitable purpose as approved by the State Government for the purpose of the rule. That would frustrate the object of the Act itself and that could not possibly be the intention of the rule making authority.

It may be mentioned that this rule is practically a verbatim copy of section 13-B of the Indian Income tax Act as it stood before the present amendments. There

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the approval of the fund or the institution being approved by the State Government, it was the Central Board of Revenue which used to approve the fund or the money trust.

In order to support his argument the counsel for the agency has urged that some of the institutions which have been approved by the State Government in its notification no. 374/1 C, dated 18th February, 1969, are not for a charitable purpose, and among them it was argued, Gandhi Memorial Fund and Kuth Valley Trust, Banars, are such institutions. Gandhi Memorial Fund is being collected for the advancement of the object of general public utility and Kuth Valley Trust Banars, is a trust which is running several educational institutions of good standard and, therefore, it cannot be said that these two institutions are not for charitable purpose especially within the meaning of the Explanation. They may not be for a charitable purpose within the commonly understood meaning of charity, which only includes giving money to beggars, but they are certainly within the meaning of charitable purpose as defined in the rule.

It was also argued by the learned counsel for the assessee that if every charitable institution has to be approved by the State Government, there is likely to be an anomaly between this rule and section 9 of the Agricultural Income Tax Act. Section 9 of the Agricultural Income Tax Act relates to exemption of income from agricultural land and is in the following words:

Income derived from a trust referred to in section 3 of the Mussalman Waqf Validating Act, 1913 commonly known as waqf ul aulad shall be treated as income of any individual provided that the part of the income actually spent on public charitable purposes shall be exempt from liability to tax.

It was argued that in this section there is no provision as to what charitable institutions would be exempted. The difference is that in this case, if the assessee has created any charitable institutions and it comes within section 9 of the Mussalman Waqf Validating Act, 1913, that the trustees would be deemed to have been approved by

income of this section, and, so far, there does not appear to be any conflict.

We, therefore, answer the first part of question no. 8 in the affirmative and the latter part in the negative, i.e., Explanation to rule 17 is not to be interpreted and applied independently of the rule and the Explanation to rule 17 is controlled by the rule itself.

Question no. 9 relates to hospitals which were subject to general inspection by the Civil Surgeon and it was contended on behalf of the assessee that such institutions will come within notification no. 374/1 C dated 18th February 1948, which is in the following words:

In exercise of the powers conferred under rule 17 of the rules framed under the U. P. Agricultural Income Tax Act, 1948, published with the notification no. 374/1 C, dated 18th February, 1948, the Governor is pleased to approve for purposes of that rule the following lands and institutions which are established in Uttar Pradesh for a charitable purpose:

- (1) Gurdh; Memorial Fund.
- (2) Harigan Ashram Allahabad.
- (3) Ravi Krishna Mission, Newabaran, Vrindavan.
- (4) Raha Valley Trust, Banars.
- (5) all educational institutions recognised by the State Government or a local authority.
- (6) all hospitals, dispensaries or clinics established in Uttar Pradesh which are in receipt of a grant by the State Government or a local body, and
- (7) any other institutions which may, on the application of the assessee or the institution, be approved by Government from time to time.

Learned counsel for the assessee had first raised an objection that this point has been raised not at the instance of the assessee but by the Board itself and there was no jurisdiction in the Board to raise that point. Reference was placed on section 24 of the Act. It was

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The view that the Board had taken, before recommending the case to the Licensing Authority was that the hospitals which were under the general inspection by the Civil Surgeon would not be treated as hospitals in respect of a grant. The Board was of the opinion that the grant should be in the shape of a secretary grant, which it would come under item no. 8 of the notification dated the 11th of February 1942. Therefore this question actually arose from one of the questions which was desired by the answer to be referred to this Court.

Objection was also taken that the Board has made a mistake in not referring all the material questions that arose under the question which was desired to be referred by the answer. If there was any omission, it was open to the answer to apply to the Board to order such other and further questions, which arose in the case and, if those questions had been refused to be referred to this Court, the answer should have come to this Court and asked for a statement on those questions.

If that had not been done by the answer, he cannot be permitted at this stage to say that certain questions which did arise have not been referred and, therefore, this Court should also frame the questions itself and answer them.

Kanga in his book, *The Law and Practice of Licensing Tax*, Volume I 1950 Edition, on page 835 has collected decisions regarding the question which should be answered by the Court. He has summarized it in this way:

It is clearly established by decisions of the Privy Council that the High Court can answer only those questions which are actually referred to it. It cannot raise and answer new questions which have not been so referred.

We may be able to re-frame a question and re-ask it but it will not be possible for us to frame an entirely new question and answer it.

On the matter it was argued that the Civil Surgeon had been inspecting these hospitals and the assistance of Civil Surgeon is taken in appointment of doctors and also in selecting medicines and that travelling and daily

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allowances of the Civil Surgeon had not been paid by the State but was paid by the State and therefore it was contended that the travelling and daily allowances paid to the Civil Surgeon should be deemed to be a grant to the hospitals within the meaning of item no. 6 of the above regulations. It was contended that the word "grant" means any promise or favour granted. This being a favour or obligation granted, therefore, it should be deemed to be a grant and an approval of the hospitals under the statute. We do not think that such a supervenient by the Civil Surgeon would either amount to an approval of those hospitals or the payment of travelling and daily allowances to him could be treated as a grant. A grant in the above sense in our opinion means any grant paid either in cash, kind or even in service but it should be a real grant in the form of a donation. Either there should have been some amount paid in cash as a grant or maintenance or there should have been free of charge regular and proper services of a doctor paid by the State available to any of the hospitals. We cannot extend the meaning of grant any further. More important by the Civil Surgeon could not be a grant. There are many other officers who inspect different kinds of institutions, e.g., Government Commissioner for prisons and the travelling and daily allowances in respect of such inspections are paid by the State, but it is inconceivable to say that in such cases those officers become or receive any grant from the State. Many other such instances can be cited.

It was further argued that these institutions in any event have been treated as approved because when the Civil Surgeon goes for inspection to those hospitals, he could not go there unless they were approved hospitals and therefore those hospitals should be deemed to have been approved by the State under rule 17. We are unable to agree with this contention also. The rule provides that approved by the State Government for the purpose of this rule. It is not any approval which will be enough for an institution or a fund to come within the purview of rule 17 unless it has been specifically approved for the purpose of rule 17. It is nobody's case that there has been any such approval of these hospitals.

Therefore we would answer question no. 9 in the negative.

Question no. 10.—(This question is not very clear. If an amount has been paid to an institution or to a fund which has been recognised by the State Government or a local authority as scholarships that would clearly come under item no. 3 of the notification, but if the scholarships are paid directly to students of an institution, the scholarships would not come under item no. 3. We would like to re-frame this question in the following manner:

(1) Whether the scholarships paid to students through an institution recognised by the State Government or a local authority are donations within the meaning of rule 17?

(2) Whether the scholarships paid to students directly would amount to donations to an institution or a fund within the scope of rule 17?

In our opinion, if an amount is donated to an educational institution recognised by the State, e.g., an University, a college or any other school, which is either recognised by the State Government or by any of the local authorities then in that event it would amount to a donation to that institution within the meaning of rule 17 whether it is paid for the purpose of maintenance of the school for payment of scholarships to students, for prize distribution for Jubilee celebrations or for any other purpose connected with the institution. But if the amount is paid directly to students, who may be the students of a recognised school, the donation would not come within the purview of rule 17.

Therefore our answer to the re-framed part (1) of question no. 10 would be in the affirmative and of part (2) in the negative.

Question no. 11.—We have partly answered this question in question no. 10. If the amount has been paid to an institution recognised by the State Government or a local authority though earmarked for a scholarship, it would be a donation within the meaning of rule 17 but simply because the amount has been paid for scholarships to an institution would not make

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the insertion an added insertion within the meaning of rule 13.

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We would therefore answer the first part of the question in the affirmative and the latter part in the negative.

Question no. 3.—Whether condition (b) in the schedule of rates is applicable to Part I alone or to both Parts I and II?

This question was originally referred to this Court by the order of the Board, dated the 14th of December, 1957, and it arose in the following way:

Under section 3 a schedule was appended to the Act which contained two parts. The heading of the schedule was "Rates of agricultural income tax." Part I related to agricultural income tax, and it gave the rates at which income tax would be charged on different incomes. Part II related to the super tax payable by those whose agricultural income exceeded Rs 25,000. In Part I, there was a proviso to the following effect:

These rates are subject to the conditions that—

- (a) no agricultural income tax shall be payable on a total agricultural income which does not exceed Rs 3,000, and
- (b) the agricultural income tax payable shall in no case exceed half the amount by which the total agricultural income exceeds Rs 3,000.

On the basis of condition (b) above, it was argued before the Board that the agricultural income tax, including super tax, could in no event, exceed half the amount by which the total agricultural income exceeds Rs 3,000. This contention appears to have found favour with the Board and they accordingly were of the opinion that the total income tax payable by an assessee could not exceed the above amount. We are unable to agree with this contention and we would answer that condition (b) of Schedule I applies only to Part I and not to Parts I and II.

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section (a), (b) and (c) of sub-section (3) of section 44 on the total agricultural income of the previous year of every person.

Thus though agricultural income tax has been defined section 3 uses the term agricultural income tax in contradistinction to super tax. It means that while using the words agricultural income tax in section 3, the Legislature did not intend to include super tax in it.

The argument of the learned counsel is, that there should be a natural presumption that identical words used in the same section or in different parts of the same Act are intended to have the same meaning and the same effect throughout the Act. But that presumption is not an invariable one or a rigid one and it would readily yield where the context requires it. If one arrives at a conclusion that the Legislature though it had defined a word, has employed it in a different part of the Act with a different intention, the court can give the real meaning to the word. It would be within the competence of the court to assign one meaning to a word in one part of the Act and to assign another meaning to the same word in another part of the Act. There cannot be any manner of doubt that when the Legislature was using the words agricultural income tax in section 3 it did not intend to include super tax. Further, the framing of two different parts in the schedule itself shows that the intention was to keep the agricultural income tax separate from the agricultural super tax. Condition (b) finds place only in Part I and is not a condition attached to both the parts.

Another reason why we are finding condition (b) attached to agricultural income tax only is that the maximum agricultural income tax, which had been imposed by the schedule as it was then applicable was 8 annas as a rupee, while the maximum super tax imposed was $\frac{1}{2}$ annas as a rupee, i.e. according to the schedule, the total agricultural income tax and super tax payable by a person would be $\frac{1}{2}$ annas as a rupee, i.e. it would be more than a half. There would be a conflict between the amount of the tax imposed by the two parts if we were to hold that the agricultural income tax including

income was up to Rs.5,000 and, therefore, in our minds when the intention of that condition was has never been made clear by this amendment.

Our answer to questions no. 5, therefore, is that clause (2) in the schedule of rates is applicable to Part I alone and not to both the parts.

Questions nos. 12 and 13—Questions nos. 12 and 13 now remain to be answered by us. They are in respect of the applications for reference which had been made beyond time. They are as follows:

(12) Whether knowledge of the order passed by the Revenue Board on the 26th of March, 1954, in revision application nos. 149, 150, 151, 161, 162 and 163 of 1953, and to have been derived from a copy of the judgments obtained by the clerk of the court for the applicant, amounted to communication to the assessee within the meaning of the word as used in section 23 of the Agricultural Income Tax Act?

(13) Whether the applications for reference was or was not barred by time?

We have in the earlier part of this judgment given detailed facts as to how these different assessments had arisen. To understand this portion of the case, we may briefly repeat a few facts. There had been three applications of revision under section 22, and three applications under section 24 filed on the 28th of April, 1952, by the assessee and three applications were filed by the State for reference under section 22 on the 28th May, 1952. All these nine applications were pending. They were heard in the month of November, 1952, and disposed of on the 16th December, 1952 and substantially the three applications of reference by the assessee were allowed and also some of the questions raised by the State were referred to this Court. Some questions were finally decided and some questions were remanded for further findings to the Assessing Authorities. On the 5th February 1953 six applications under section 24 (2) were moved for reference by the assessee on certain points which had arisen out of the points, which had been

the Dictionary meaning of the word "communication", which states: "the act of reporting, conveying or delivering from one to another; interchange by words, letters or messages; interchange of thoughts by conference or other means." It was contended that, in whatever manner the decision had been communicated or brought to the attention it would amount to a communication within section 24. Section 25 of the Act reads as follows:

25. An authority passing any final order under section 21 or section 22 shall communicate such order to the insurer.

Thus there is a mandatory provision in the Act that the authority which passes the final order under section 22 shall communicate such order to the insurer and, therefore, the final order on the revision application of the insurer should have been communicated by the Board to the insurer. It cannot get out of that matter, today and later on, say that even the message had come to later of the order, it was not its duty to communicate.

It was argued by the learned counsel for the State that if the judgment were delivered in open court, then there would be a communication of the orders and, therefore, no further communication was necessary. We are unable to accept that contention. What section 25 contemplates is a communication of the complete order of the Board, rather a true copy of the judgment delivered by the Board or by any authority and it would be the date from the receipt of such communication that the limitation would run. Under section 24(2) the words used are "within sixty days of the communication of an order under section 21 or section 22" and then the order under sections 21 and 22 has to be communicated by the authority passing such order to the insurer. This order obviously having never been communicated, the period of sixty days did not start to run.

Apart from this fact even though the copy of the judgment had been given to the insurer's counsel on the 15th of May 1954, it cannot be supposed that the judgment had been read on that very day. The insurer and his general agent may have been under the misapprehension that what was communicated to them on the 15th

April 1954 was contained therein and that the copy of the judgment was obtained only for the purpose of arguments in the High Court when the matter would come up there. Under the circumstances we think that the period of sixty days did not start running at all and the applications filed for reference on the 15th of September 1954, cannot be deemed to be time barred.

We would therefore, answer question no. 12 in the negative and the answer to question no. 13 would be that the application was not time barred. The Board should hear the applications for reference and decide it in accordance with law.

This disposes of all the questions, i.e., questions nos. 1 to 13 involved in the above references. Some questions are answered in favour of the assesse and some against him; therefore, we order the costs to be cost by. For taxation purposes the Standing Council's fee is assessed at Rs. 500.

Questions answered

APPELLATE CIVIL

Before Mr. Justice Deyal and Mr. Justice Upadhyaya
MUNNA LAL GOEL and another, (Appellants)

v

SRI KISHAN PAHALWAN and others (Respondents)

For the assesse.— Permission for granted by the Rent Control and Eviction Officer—Passer of District Magistrate to serve or suggest tenants of the semi-United Provinces (Temporary) Control of Rent and Eviction Act 1947 s. 3.

The application for permission to use the section under s. 3 of the Control of Rent and Eviction Act being refused by K the Rent Control and Eviction Officer, one appellant filed an application before the District Magistrate who sent it to K with the direction. Please to consider the matter after hearing the parties, whereupon K gave a further hearing to the parties and granted the requisite permission.

Held: That an order once passed, by the Rent Control and Eviction Officer cannot be disturbed or varied by the District Magistrate or by the Rent Control and Eviction Officer acting under the direction or suggestion of the District Magistrate.

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Munna Lal
Goel and
another
v
Sri Kishan
Pahalwan
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The District Magistrate cannot, in this respect, be said to be an officer superior to the Rent Control and Eviction Officer. Moreover, the power of a superior administrative or executive officer to control and guide his subordinates can, if available to him, be exercised before and not after the passing of an order.

Objections to the contrary in *Munna Lal v. Chandrahar Hari (1)* and *Shahidul Feroze v. The District Magistrate, Azamgarh* (2) disappeared.

Quare: Whether the Rent Control and Eviction Officer could reverse the order on his own, separately and as a result of the merits of his individual and independent judgment?

Special Appeal No. 31 of 1958 from a decree of *Moharra, J.* dated 6th September 1957 in Civil Misc. Writ No. 561 of 1957.

The facts appear in the judgment.

P. C. Gupta and *K. G. Saxena* for the appellants.

S. N. Kachar for the respondents.

The judgment of the Court was delivered by—

Ratio. (1) —This is a Special appeal by *Munna Lal* Godi and *Shamari Ram*, *Kachori Godi* against the order of Mr. Justice *Mishra*, allowing the writ petition under Article 226 of the Constitution filed by *Shri Sri Krishna* and *Shri Purni Chand Moharra*, respondents 1 and 2 respectively.

The appellants are the owners of certain premises occupied by the abovesaid respondents. They applied to the Rent Control and Eviction Officer for permission to use these respondents' (in apartment) under section 5 of the U. P. (Temporary) Control of Rent and Eviction Act—hereinafter called the Act—on the allegation that they wanted these premises for *Munna Lal Godi's* occupation in order that he might carry on his business there. The respondents contended that *Munna Lal Godi* did not require the shop for the purpose alleged. The Rent Control and Eviction Officer after making enquiries rejected that application on the 31st January, 1956.

The appellants did not then file a revision before the Commissioner under subsection (2) of section 3 of the Act, which they could do within thirty days from the

communication of the order of the Rent Control and Eviction Officer to them. Instead, Shri Ram Kishor, appellant no. 2 presented an application dated the 19th February 1954 to the District Magistrate. Kishor being deputed the communications of the family, denying that any request for postponement of rent was made to the respondents and just saying that Munna Lal Gosh, her son, had applied to the Rent Control Officer, but that application was decided in favour of the respondents on account of their wrong statements and ignorance of Munna Lal Gosh. She proved that her shop, he got vacated and that that person he drove and promised that she would not be in debt on rent and that her son would carry on business in the shop. The District Magistrate sent the application to the Rent Control and Eviction Officer with the direction: Please re-consider the matter after hearing the parties.

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Lal Gosh.
The
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The Rent Control and Eviction Officer accordingly gave a further hearing to the parties and on the 1st October, 1954 granted the appellants permission to sue the respondents for ejectment.

The respondents then went to the Commissioner in person. The Additional Commissioner dismissed the petition. They then filed the writ petition which was allowed by the learned Judge by an order which is the subject matter of this appeal.

The learned Judge held that the District Magistrate's direction forwarding the application of the appellants no. 2 to the Rent Control and Eviction Officer amounted to his annulling the order dated the 31st January 1954 of the Rent Control and Eviction Officer refusing permission to sue for the ejectment of respondents and that the District Magistrate could not do. He further held that the Rent Control and Eviction Officer in his subsequent order granting the permission had not considered the point of view of the tenants as a whole. He also held that in these circumstances it could not be said that the Rent Control and Eviction Officer had independently applied his mind to all the relevant considerations under section 3 of the Act. He made it clear in his order

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that it was open to the landlords to make a fresh application for permission to file a suit which would be dealt with by the Rent Control and Eviction Officer in accordance with law. The appellants do not appear to have taken advantage of that alternative open to them and filed the Special appeal presumably knowing full well that it would take considerable time for disposal.

The main contention for the appellants is that the decision of the District Magistrate has been circumvented by the learned Judge and that it did not amount to the District Magistrate's cancelling the order of the Rent Control and Eviction Officer dated the 11th January, 1954. Further, it is contended that the District Magistrate could legally give such a decision as he had given in this case to the Rent Control and Eviction Officer. We do not agree with these contentions.

It is necessary to determine the nature of the District Magistrate's direction on the application presented by Surjit Ram Karon on the 11th February, 1955. The direction was to re-consider the matter after hearing the parties. It is true that the District Magistrate did not specifically say that he was cancelling the order of the Rent Control and Eviction Officer and that he did not order the Rent Control and Eviction Officer to cancel his previous order. The District Magistrate simply asked that officer to re-consider the matter after hearing the parties. The Rent Control and Eviction Officer had finished with the matter. He had decided it finally, holding that the appellants had no genuine need for the premises. The aggrieved party could go to the Courts once again against the order within thirty days of the order. We doubt whether the Rent Control and Eviction Officer in the absence of any permission could have returned the order even if he had been approached directly. No question of reconsideration, therefore, could possibly arise. Reconsideration can take place only when the previous order be cancelled or be deemed to have been cancelled. We are, therefore, of opinion that the District Magistrate's decision did amount to the implied cancellation of the order of the Rent Control and Eviction

Officer refusing to give permission for using the respondents for specimen. The District Magistrate's order in the alternative would appear to a direction to the Rent Control and Eviction Officer to cancel his previous order, to release the parties and then to decide the matter afresh. Whatever of the two interpretations be given to the District Magistrate's order, the District Magistrate had no jurisdiction to pass such an order. There is ample authority to support this view.

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Provinces
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The earlier case is that of *R. N. Seth v. Ganga Behar* (1). There the Rent Control and Eviction Officer of Lucknow granted permission on the 26th April 1947, to restrain the suit for specimen. That permission was revoked by the District Magistrate Lucknow on the 24th July, 1947. It was observed in this case at page 312

The power assumed by the District Magistrate in cancelling the order previously issued by the Rent Control and Eviction Officer was in the nature of an appellate or revisional power which cannot be exercised in the absence of an express statutory enactment. No power is given under the Control of Rent and Eviction Act to any authority to sit in appeal or revision against an order passed by the District Magistrate under section 3 of the Act and the District Magistrate could not, therefore, revise the order of the Rent Control and Eviction Officer passed on 26th April 1947.

It may just be mentioned that in 1947 there was no provision for filing a revision before the Commissioner against the order of the District Magistrate or the Rent Control and Eviction Officer under subsection (1) of section 3. Such a provision was made in 1952 by the U. P. (Temporary) Control of Rent and Eviction (Amendment) Act (XXIV of 1952) which came into force on the 1st October, 1952.

In *Jang Behar v. District Magistrate, Benares* (2) the Additional District Magistrate set aside the order of allotment made by the Assistant Rent Control Officer

(1) A. I. R. 1952 All 312.

(2) 389A L. J. 355.

121 On merits the order of the Additional District Magistrate was considered to be correct and, therefore, the petition was rejected. V. Bhagavata, J. considered this case distinguished it and left the question open remarking at page 237

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It is obvious that if two orders emanate from the same power one cannot reverse the order of another. But if the jurisdiction is concurrent, it may be possible for one to reverse the order of another.

Similar view is implied in the observations of MAHAJ, C. J., in *Syed Abdul Hamid v. Sec. Farana Begum* (2). He said at page 159:

If the Rent Control and Eviction Officer had been acting independently and had passed final orders which are now reversible by the Commissioner and then, by the Local Government the District Magistrate who has neither appellate nor revisional powers may not be entitled to interfere, but, where, as in this case, the District Magistrate has all along been functioning through the Rent Control and Eviction Officer and bearing in mind that the orders passed were administrative or executive orders, it cannot be said that the order passed by the Magistrate on the 6th of April, 1948 was without jurisdiction as by that order he was merely recalling a permission which had been granted as his order.

In *Mahabir Prasad v. The District Magistrate, Kanpur* (3) the Rent Control and Eviction Officer passed an erroneous order in favour of Mahabir Prasad on the 14th June 1951. The undersigned competent Benchader failed in his various attempts to get that order set aside and when an order for his eviction under section 7 A of the Act had been made, he approached the District Magistrate on the 12th May, 1953 and prayed that a habeas corpus might be held and further proceedings for his eviction might be stayed. The District Magistrate by his order dated the 18th September, 1953, directed the Rent Control and Eviction Officer to cancel the order made by him in Mahabir Prasad's favour and to

allow the shop to remain. The Rent Control and Eviction Officer passed an order on the 25th September, 1955 allowing the shop of Benadher as demanded by the District Magistrate. *See MORTON LEE, J.*, and at page 296.

The mere fact that another officer has also been empowered under the Act does not take away the District Magistrate's own power. Both of them can exercise concurrent jurisdiction. If a prisoner instead of applying to the Rent Control and Eviction Officer approaches the District Magistrate, the latter has certainly jurisdiction to pass a suitable order thereon. But a power under concurrent jurisdiction can be exercised so long as it has not been exercised in respect of the same matter by another co-ordinate authority. To hold that the District Magistrate can interfere with an order of the Rent Control and Eviction Officer even after that officer has passed an order will mean converting an authority of concurrent jurisdiction into a superior authority. Moreover, anomalous results will follow from such a proposition. If the District Magistrate exercising a concurrent jurisdiction is held entitled to upset the order of the Rent Control and Eviction Officer, the latter can for similar reasons again upset the order of the District Magistrate. This will lead to utter confusion. This could never have been the intention of law.

We further hold that the District Magistrate, as a superior authority could not upset the order of the Rent Control and Eviction Officer and observed at page 296:

When a power is conferred by a public servant under statutory sanction, that power can be exercised by him alone and not by any superior authority. But the higher authority cannot by its own order set aside the order of the inferior authority and assume to make an appellate or revisional and power, which has not been conferred upon it by the statute. If it were possible to hold that the District Magistrate by reason of being a superior authority can

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LEE, J.
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upon the Rent Control and Eviction Officer's order, it will follow from the mere process of reasoning that the Commissioner can also be seized of being a higher authority upon the District Magistrate's order and the State Government can upon the Commissioner's order.

But MURRAY LAL, J. further held that the Rent Control and Eviction Officer could not lawfully cancel his own order when that cancellation was not the result of the exercise of his own discretion but was brought about in pursuance of an order of a superior authority and that, in such a case, it was really the order of the superior authority and that authority could not be permitted to do through the agency of its subordinates, what it could not do itself.

MOOREHEAD, C. J., agreed that the District Magistrate could not cancel the aforesaid order made by the Rent Control and Eviction Officer.

In *Sri Ram Chandra v. The District Magistrate, Mysore* (1), the Rent Control and Eviction Officer fixed the rent of the accommodation in suit at Rs.45 per month. The landlord issued a notice to the civil court under sub-section (3) of section 3 A of the Act approached the District Magistrate who called for a report from the Rent Control and Eviction Officer and later directed the Rent Control and Eviction Officer to reopen the proceedings and to submit another report to him.

But MURRAY LAL, J. held that the District Magistrate had no power to issue such an order to the Rent Control and Eviction Officer and observed:

The District Magistrate had no power to issue any order to him. If the District Magistrate had concerned himself with suggesting to the Rent Control and Eviction Officer as to whether the permission and had left the said officer free to accept that suggestion or not, the persons would have been left out. What the District Magistrate has done is to call for a report and after the receipt of that

(1) Civil Miscellaneous No. 10 of 1953 decided on 18th March 1955.

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In *Mohammed Farsi v. The District Magistrate, Kanpur* (1), the Rent Control and Eviction Officer passed an order on the 18th January 1955 granting permission to the landlords to file the suit for eviction. The tenants then presented two applications, one before the Rent Control and Eviction Officer for a re-consideration of his order and another before the District Magistrate with the same prayer. The Rent Control and Eviction Officer rejected the applications presented to him on the 2nd February 1955. The District Magistrate, however, directed the Rent Control and Eviction Officer by his order, dated the 23rd February 1955, to hear the parties and to report to him and to ask the landlords not to file the suit for eviction in the civil court. The Rent Control and Eviction Officer complied with these directions and his final report to the District Magistrate suggested that the permission already granted be cancelled. The District Magistrate then ordered on the 15th June 1955. Please cancel permission to even given to the landlord. On receipt of this order the Rent Control and Eviction Officer cancelled his previous order. It was held that the rehearing started at the instance of the District Magistrate, that the Rent Control and Eviction Officer throughout acted under the directions of the District Magistrate and that the cancellation of the permission was under the directions of the District Magistrate and not due to any independent volition of the Rent Control and Eviction Officer himself. The cancellation order was, therefore, held to be valid and not quashed.

It is, therefore, well settled that the District Magistrate cannot cancel or direct the Rent Control and Eviction Officer to cancel his previous order passed in the exercise of the statutory powers conferred on him under the Act.

Even if it be assumed that the District Magistrate's order did neither amount to cancelling the order of the Rent Control and Eviction Officer explicitly, nor to directing the Rent Control and Eviction Officer to cancel his previous order and that it was simply an order by a

(1) See *Mohammed Farsi v. The District Magistrate, Kanpur*, AIR 1959 SC 100.

superior officer to a subordinate officer suggesting to him a reconsideration of the matter after hearing the parties, we are of opinion that such a suggestion cannot be made by the District Magistrate to the Rent Control and Eviction Officer. It is open to question whether the District Magistrate is really a superior officer of the Rent Control and Eviction Officer when the latter exercises certain powers of the District Magistrate under the Act. The Act does not contemplate any officer subordinate to, or inferior to, the District Magistrate. It does not, of course, contemplate by the expression District Magistrate just the District Magistrate who is the head of the district administration. By the expression District Magistrate the Act means not only the District Magistrate who is the head of the district administration but also an officer who is authorized by the District Magistrate to perform any of his functions under the Act, such an officer is usually called the Rent Control and Eviction Officer. The moment the District Magistrate has authorized some other person to perform such functions, that officer for the purpose of the Act is in good a District Magistrate as the District Magistrate conferring the power is. The Act makes no distinction between their respective powers and has not given any particular power to the District Magistrate which he could exercise with reference to the orders passed by the Rent Control and Eviction Officer or with reference to the proceedings pending before him. The District Magistrate should act, in the interest of proper discharge of his duties by the Rent Control and Eviction Officer, make any particular suggestion to the latter in connection with a matter pending before him. The Rent Control and Eviction Officer has to exercise his own mind with respect to the matter for determination before him. The mere fact that the District Magistrate authorizes such an officer to perform certain of his functions under the Act does not by itself make him, in the absence of any such provision in the Act, a superior to the Rent Control and Eviction Officer. So the very first premise for the contention that the District Magistrate can make a suggestion for reconsideration to the Rent Control and Eviction Officer falls to the ground and there remains no question

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Special appeal, however, shows that the District Judge made a order contained the direction. Previous order passed on this subject will be treated in the light of this order. Consequently the Raja Control and Revenue Officer withdraw the permission previously granted.

ARMSTRONG, J., who was a member of the Senate deliv-
ering the judgment, himself held differently in *In re*
Antoniades-Nicki-Soren v. District Magistrate, Israel
(1). He held that the District Magistrate could control
and guide the River Control and Erection Officer before
he passed any order but could not do so after the River
Control and Erection Officer had exercised his power
and made an order, and explained the import of the
above-mentioned observation of MAIT, C. J. He said
in para. 274

* In the exercise of administrative functions there is scope for the officer exercising them being controlled by superior officer unless the exercise of the discretion is vested in the particular officer by a statutory provision. As already stated, the Act authorises the District Magistrate to perform the functions mentioned therein. It also authorises an officer authorised by him to act on his behalf to do the same so far as his authority will extend. It follows therefore that in administrative matters the agent of the District Magistrate may be guided by the latter as to the manner in which he will exercise the functions mentioned to him, see *Mahon Lal v Chaudhilar Huss* (2). Before the Rent Control Eviction Officer has exercised any of the powers vested in the District Magistrate under the Act, he may be controlled and guided by the District Magistrate his principal. Once he has so exercised his powers, his order is an order under the Act, and it can be interfered with only as provided under the Act and not otherwise.

In *Sri Syed Abdul Mawad v. Sri Fatma Begum*, (1997) 100 M.L.J. 611, was not removed as an in the bench

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These observations certainly go due to attendance in law. In that case, the landlord applied to the District Magistrate for permission to use the tenant for specimen. The District Magistrate forwarded the application to the Rent Control and Eviction Officer saying that the landlord be permitted to file a suit after two months. The Rent Control and Eviction Officer accordingly gave the necessary permission without even issuing notice to the tenant. When the tenant filed an objection before the District Magistrate, the latter cancelled the permission granted to the landlord. By the Rent Control and Eviction Officer and directed that notice be issued to the tenant and that both the parties be heard in the case before final orders were to be passed. The Rent Control and Eviction Officer thereafter heard the parties and recommended to the District Magistrate that the original permission be maintained. The District Magistrate, however, was of a different opinion and wrote back that it would be unfair to turn out a tenant of long standing without giving him alternative accommodation. The house suggested being too small for his family. The Rent Control and Eviction Officer thereafter refused the permission. *MALINI, C. J.*, reviewed what he had said in *Mahua Lal's case* (1) about the exercise of administrative or executive power subject to the control and guidance of the revenue officer but said, what is already quoted before, at page 178.

If the Rent Control and Eviction Officer had been acting independently and had passed final orders which are now reversible by the Commissioner and then, by the Local Government, the District Magistrate, who has neither appellate nor revisional powers may not be entitled to interfere, but where, as in this case, the District Magistrate has all along been functioning through the Rent Control and Eviction Officer and bearing in mind that the orders passed were administrative or executive orders, it cannot be said that the order passed by the Magistrate on the 6th of April 1948, was without jurisdiction as by that order he was merely cancelling a permission which had been granted at his instance.

In *Meisler Press v. The District Magistrate, Rasper*
(2) *Berg House Ltd., J* said at page 285

THE
MAGISTRATE
Said: "It is
the
Duty of the
Magistrate
to
consider
the
case."

Where a power is entrusted by a public servant under statutory authority, that power can be exercised by him alone and not by any superior authority. The superior authority may give him suggestions and may even ask him to re-consider his decision, leaving to him the freedom to change or mind or not. If in such circumstances the officer who originally passed the order changes his mind and agrees, as a voluntary conclusion, the order will be perfectly valid because it would be the order of the original authority and not of the higher authority.

He explained the observations in *House Ltd's case* (2) thus at page 287

What she learned from Justice means by the above-quoted remark was that the District Magistrate could suggest new facts and new aspects of the case to the Rent Control and Eviction Officer and could ask him to re-consider the matter in the light of those suggestions. Had it been his Lordship's intention to say that the District Magistrate could substitute his own decision for the decision of the Rent Control and Eviction Officer, a more explicit language would have been used. It may again be pointed out that in the *Full Bench* case cited above the Hon'ble the Chief Justice has remarked that where the Rent Control and Eviction Officer has been acting independently, different considerations arise and it is not possible for the District Magistrate to interfere. His remark relied upon by the learned counsel for the opposite party are to be interpreted in the light of his observations in the *Full Bench* case. Obviously his Lordship means that the District Magistrate could ask the Rent Control and Eviction Officer to re-consider the matter. He did not mean to hold that the District Magistrate could override the decision of the Rent Control and Eviction Officer.

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With respect, we do not agree with this interpretation of the results as in this case it had been found that the Bench Control and Executive Officer passed the correct order at the discretion of the District Magistrate.

It is clear from the above discussion that the view expressed in *Maharaj Pal's* case (1) about the exercise of administrative or executive power by the Bench Control and Executive Officer under the control and guidance of the District Magistrate, the superior officer, has not been fully accepted in later cases which clearly lay down that an order once passed by the Bench Control and Executive Officer cannot be cancelled, varied or rescinded by the District Magistrate or by the Bench Control and Executive Officer under his directions even if the Bench Control and Executive Officer himself can do so on his own motion and in the result of his exercising his own mind independently and that such guidance can be given prior to the Bench Control and Executive Officer's passing an order and not later.

Just as it has been stated in the Full Bench case of *Shri Sridhar Prasad v. Shri Fatima Begum* (2), that the subordinate Magistrate will not think of interfering with the order of his superior, the District Magistrate, it can be said that the Bench Control and Executive Officer will not think of not acting according to the recommendations or suggestions of the District Magistrate and that, therefore, any suggestion or recommendation by the District Magistrate in connection with an order already passed by the Bench Control and Executive Officer must have the result of depriving that officer of the exercise of his own independent mind. When the District Magistrate asked the Bench Control and Executive Officer in the present case to reconsider the matter after hearing the parties the Bench Control and Executive Officer has no option but to reconsider the matter which, as already mentioned, implied a strong made the original order and replacing it by a subsequent order which may be of the same nature but, certainly would be a new order. It may be said that the District Magistrate by his recommendation had offered the application for review

though he had left the appeal return of the previous order to the Rent Control and Eviction Officer. Both the acts are the act of considering the question whether a review application should be granted or not and if granted, the act of finally disposing the matter and to be followed by the same officer just as they are done in court. Here the District Magistrate undertakes to do the first act, i.e. allowed the review application so the extent that the case be re-heard. He did not pass the final order, nor did he give any direction about it. It was left to the Rent Control and Eviction Officer to pass a suitable order after hearing the parties. The District Magistrate's order, therefore, substantially trespasses over the jurisdiction of the Rent Control and Eviction Officer and thus adversely affected his jurisdiction. It cannot be said what the intention of the Rent Control and Eviction Officer was, it would have been so the application of Smt. Ram Karoni if it had been presented to him and had not been received by him with the District Magistrate's recommendation.

It has been urged for the respondents that the order of the Rent Control and Eviction Officer becomes final after thirty days if no revision is filed and thus, therefore, even the Rent Control and Eviction Officer cannot revoke his previous order. It is not necessary to consider this question as we have held that the Rent Control and Eviction Officer did not return the order at his own instance and had done so under the direction of the District Magistrate.

It may be open to the Rent Control and Eviction Officer to entertain a fresh application for permission to sue after he has rejected a previous one; but such a new or fresh application will be entertained ordinarily only on the basis of fresh material which was not available at the consideration of the previous application. The application of Smt. Ram Karoni to the District Magistrate is the present one was not a fresh application for permission. It was an application alleging that the order in the earlier application had been wrong and praying for justice being done by having the other party receive the

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120 previous. Paragraph 12 of the counter affidavit, sworn to by Munna Lal Goel, states:

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Sd.
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Exhibit
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The only object of approaching the District Magistrate was that the deponent's application under section 3 may be properly considered, on merits and disposed of according to law.

In the circumstances it is not open to the appellants to argue that this was a fresh application for permission. It was clearly an application to the District Magistrate for staying made the order of the Revenue Control and Eviction Officer.

It has been strenuously urged for the appellants that there being no error apparent on the face of the record this Court could not interfere when the Revenue Control and Eviction Officer and the Commissioner have followed the procedure laid down in the Act. We have already indicated that what took place in the present case was not in conformity with what is provided in the Act. The Act does not provide for the District Magistrate interference with the order of the Revenue Control and Eviction Officer either by directly interfering with it or by issuing an injunction by the Revenue Control and Eviction Officer himself. The error committed by the Revenue Control and Eviction Officer in issuing the previous order in the circumstances of this case is fairly well apparent. The Commissioner took a wrong view of the law as interpreted by this Court and his order also, thus too, suffers from an apparent error of law. This Court can interfere with such an order.

It has also been contended for the appellants that the respondents did not avail of the right to go to the State Government in view of its powers under section 3 F of the Act. It was held in *Ray Kishore v. The Revenue Control Officer, Raipur* (3) that this section gives no right to a party to approach the Government. It was observed at page 176:

We are of opinion that this section does not afford any alternative remedy to the appellants. The appellants have not been given any right to

approach the State Government to revise the order passed by the Rent Control and Eviction Officer. This would just empower the State Government to call for the record and make suitable orders. The applicants themselves cannot approach the State Government by way of appeal or revision against the order of the Rent Control and Eviction Officer.

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We are therefore of opinion that the District Magistrate had no power to pass the order he did directing matter after hearing the parties and that that order and the Rent Control and Eviction Officer's reconsideration of the Officer were bad in law and had been rightly set aside by the subsequent order of the Rent Control and Eviction Officer by the learned Judge.

In view of the above, we dismiss the appeal with costs.

Appeal dismissed.

CRIMINAL MISCELLANEOUS

Before Mr. Justice F. D. Bhargava

D. G. ATHALYE

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STATE

Control Procedure Code, 1939, s. 125, 121 A—Industrial Disputes (Appellate Tribunal) Act, 1950, s. 23—Control Procedure Industrial Disputes Act, 1947, s. 34—Governments notification no. 4-661 (L.L.) (J.C.D.P.) 2-271 (L.L.)-1950, dated 14th July, 1950, s. 23 25—Control Procedure General Clauses Act, 1907 s. 4 (2), (7)—Labour Disputes pending before different authorities—Provisions to demand an employee dismissed as good faith from the Labour Appellate Tribunal only—Prohibition for demand to return performance from the Regional Commissioner Officer—Defence under s. 13 Industrial Disputes Act, s. 23 available—Good faith "Act done" includes illegal actions.

While labour disputes between the Upper Ganges Valley Electricity Supply Co. Ltd. Moradabad, and its employees were pending before also before the Regional Commissioner Officer, Kanpur, and the Labour Appellate Tribunal, D. G. A., Benares

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Registry of the Company, chairman C. B. S. Mehta, Foreman, on the strength of permission secured from Jale on 16th March, 1955 from the Labour Appellate Tribunal alone under s. 22, Industrial Disputes (Appellate Tribunal) Act, 1949. Thereupon Deputy Magistrate Miralshah issued warrants against B. G. A. under s. 14 U. P. Industrial Disputes Act, 1947 read with s. 25 Government's notification no. 4-1954 (S.L.) (XXXIV) B-887 (S.L.)-1954 dated 19th July 1954 for the above demand without permission from the Regional Commissioner, Office of the I.D. concerned.

Upon application, by the accused under s. 205, Cr.P.C., Criminal Procedure Code.

Held, (i) that there was no allegation of bad faith, and there could be no presumption of bad faith against the accused.

(ii) that he had acted in good faith as defined in s. 4(17) U. P. Criminal Classes Act.

(iii) that he acted honestly and in good faith as defined under s. 4(1), U. P. Criminal Classes Act.

(iv) that he was protected by s. 22 U. P. Industrial Disputes Act.

The criminal proceedings were, therefore, quashed.

Criminal Miscellaneous No. 1755 of 1957

The facts appear in the judgment.

Copied Orders for the applicant.

C. A. for the State.

V. D. BHANDARI, J. —This is an application under sections 203 A and 205 of the Criminal Procedure Code for quashing the proceedings, or in the alternative, to transfer the case from Miralshah to some other adjoining district. The applicant, Sri B. G. Arshadya was Resident Engineer of the Upper Ganges Valley Electricity Supply Co., Ltd., Miralshah, on the 12th of March, 1955, but on the date of the prosecution he had ceased to be so. There were labour disputes pending between the company, of which the applicant was the Resident Engineer, and its employees, one of them being one Sri C. S. Srivastava, Main Foreman. These labour disputes had been pending both before the Regional Commissioner Office, Kanpur, and the Central Government Industrial Tribunal, India, Lucknow, and also before the Labour

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Clause 13 of the same order provides

Any person who contravenes or attempts to contravene any provisions of this Order or abets any such contravention shall be liable, on conviction, to fine or to imprisonment not exceeding three years or both.

It has been asserted that since the matter had been pending both before the Appellate Tribunal as well as the Regional Conciliation Officer, the applicant thought that the permission of the appellate authority to dismiss would be enough and no separate permission from the Conciliation Officer was necessary. It has further been stated that in similar cases when permission of the Regional Conciliation Officer of the area concerned had been sought for, such officers had declined to give permission on the ground that the permission of the Appellate Tribunal alone would be deemed sufficient and that no permission of the Conciliation Officer was necessary. In order to support his case the applicant has filed, as Annexure E an order of the Additional Regional Conciliation Officer, Bawdly, dated the 7th of October, 1952 where the Regional Conciliation Officer did not pass any order on the ground that proceedings relating to that dismissal were pending in appeal before the High We Appellate Tribunal in which workmen were involved. He had ordered that the employers, if they so desired, should take permission under section 21 of the Industrial Disputes (Appellate Tribunal) Act, 1950. Similar is the order by the same officer in another case which has been filed as Annexure F. Another Regional Conciliation Officer of another region in the case of a steel company, i.e. U. P. Electric Supply Co., Ltd., Allahabad, had passed similar order. In that case permission was sought to discharge one of the employees. The Additional Regional Conciliation Officer of Allahabad on 1st September, 1952, ordered that as he had been informed that appeals are pending before the Labour Appellate Tribunal at Delhi, the company should seek permission from there and no permission was granted by the Regional Conciliation Officer. Annexure H is also an order in the same effect.

When the Conciliation Officer was requested to give the permission upon after these orders, he informed that the decision had already been issued and no further action could be taken by that office.

The present prosecution is under clause 15, read with section 14 of the U. P. Industrial Disputes Act, 1947. There can be no doubt that so far as the present applicant is concerned he had acted bona fide. The company as well as the union concerned had on previous occasions tried to obtain permission to dismiss employees from the Regional Conciliation Officer of the area concerned but they had refused to give permission on the ground that because cases are pending before the appellate authorities permission should be given by them and they did not reserve their right and there had been several occasions when this reply had been received by the company. Thereafter, the applicant acted on that advice and dismissed Mr G. S. Srivastava after taking permission from the Appellate Tribunal. It cannot but be said that the applicant had acted in good faith. Good faith has been defined under section 4(17) of the General Clauses Act as meaning anything done honestly whether it is done negligently or not.

Now I am of opinion that there can be no doubt of the good faith of the applicant. He was under a bona fide impression that prior permission from the Appellate Tribunal—which was higher authority—had been obtained, no permission of the Regional Conciliation Officer was required. He had also very good reasons to arrive at that conclusion, because in several of the cases Regional Conciliation Officers had also rejected the applications for permission on that very ground.

I do not wish to express any opinion on the question whether in such circumstances permission of the Regional Conciliation Officer of the area concerned was necessary or not. Even assuming that it was necessary, in any event, the applicant is protected by section 21 of the U. P. Industrial Disputes Act, which reads as follows:

No civil prosecution or other legal proceedings shall lie against any person for anything which is

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is good faith done or intended to be done in pursuance of this Act or any rule or order made or directed to be made thereunder.

Thus, if the applicant is good faith dissenter Sec. 8. Servative, I think he would be protected under this section. It may be argued that this section only says 'an act done in good faith' but here there was an intention of obtaining the permission for which he is being charged and therefore, it can be said that section 12 would not apply to the facts of the present case. Section 4(2) of the U. P. General Clauses Act provides: 'Act used with reference to an offence or a civil wrong shall extend to acts and words which referred to acts done include also to illegal omissions.'

Thus if that omission, though may be illegal, was done in good faith it would amount to act done within the meaning of section 12 of the Industrial Disputes Act.

I have perused the complaint filed in this case against the applicant which is Annexure B and the affidavit. There is no allegation of bad faith on the part of the applicant. Under the circumstances unless there be circumstances from which inference of bad faith can be drawn it would be deemed that he was acting in good faith and there cannot be a presumption of 'bad faith' against an accused. I, therefore, allow this application and quash the proceedings.

Application allowed

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APPELLATE CIVIL

Before Mr. Justice Bhargava and Mr. Justice Tandon
ASLAM KHAN (Appellant)

v.

FAZAL HAQUE KHAN and others (Respondents)
*Ownership of India—disputes under the Constitution—
 disputes by Regulation under the Citizenship Act—
 Regulation of Constitution of India, 1950 (Sec. 3 and 7—
 Citizenship Act 1955 in 2(1)(a) 2(1)(b) 2(1)(c) 2(1)(d)
 and 2(2).*

HL, who had his domicile of origin in India where he and both of his parents had been born and living ever since,

opened finally for Government service in and assigned to Poligar after the first day of March 1941. He joined Poligar Government for six months and then resigned and came back to India in February 1942. On the 15th August 1944 he obtained a certificate of registration as an Indian citizen from the Collector of Rangoon and was elected to the U. P. Legislative Assembly in 1947. His election being challenged, order also on the ground that he was not a citizen of India.

Held, (a) that notwithstanding the fact that he fulfilled all the conditions for Indian citizenship under Art. 5 of the Constitution but was not within Art. 7 so that he never acquired Indian citizenship under the Constitution.

(a) that for the purpose of acquisition of Indian citizenship by registration under the Citizenship Act, he was not covered

(a) not by s. 3(2) since he could not be said to have ever resided in India deprived of Indian citizenship

(a) not by s. 3(3)(a) since he could not be the citizen of the independent India as by the Central Government under s. 3(1)(a) he decided to be a citizen of Pakistan.

(a) not by s. 3(1)(a) as a person of Indian origin and partly resident of India and being an resident for six months immediately before making the application for registration.

(a) that it was under the circumstances not necessary for him to obtain registration from the Central Government and that the registration by the Collector being good and sufficient he became the citizen of India on the 15th of August 1944 and was therefore duly qualified for the membership of the Legislature.

First Appeal No. 138 of 1948 from an order of R. Chandra, Member, Election Tribunal, Rangoon, dated 19th February, 1948, in Election Petition No. 62 of 1947.

The facts appear in the judgment.

F. N. Durrani and K. K. Bappa for the appellants.

Jagdish Tiwari and D. P. Agarwal for the respondents.

The judgment of the Court was delivered by—

RAMASWAMI, J.—The appellants Aslam Khan, respondents Fazal Haque Khan, Abdul Hadi Khan and Shau Khan and one Tribeni Jahan Mian were candidates for election to the U. P. Legislative Assembly in the general elections held in February and March, 1957 from no. 68, Rangoon Constituency. All the five candidates filed nomination papers on the 31st of January, 1957, and after

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same date mentioned, for the first time, under the Constitution when India became a Republic. Article 5 of the Constitution recognized as a citizen of India every person who had his domicile in the territory of India and (a) who was born in the territory of India, or (b) either of whose parents was born in the territory of India, or (c) who had been ordinarily resident in the territory of India for not less than five years immediately preceding such commencement.

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Aslam Khan appellant had his original domicile in the territory of India and he was also born in the territory of India. Both his parents were also born in the territory of India. Consequently if Article 5 of the Constitution could have been applied to him, he would have been a citizen of India, under that provision. The Constitution in Article 7, however, made an exception and had down that—

notwithstanding anything in Articles 5 and 6, a person who has after the first day of March, 1947, migrated from the territory of India to the territory now included in Pakistan shall not be deemed to be a citizen of India.

It is the admitted case of the parties that the appellant had left India after the first day of March, 1947. It appears that the appellant, in the year 1947, was in Government service. He had the choice of going for India or Pakistan and he opted for Pakistan. In pursuance of the option exercised by him, he actually went to Pakistan and served under the Government of Pakistan. Later however, he resigned and came back to India in February, 1948. The contention of the appellant was that, even though he had opted for Pakistan, he had never renounced, nor had been deprived of his Indian citizenship, nor had his Indian citizenship terminated under the Citizenship Act, 1935. It was further his case that he had not migrated from India to Pakistan, so that Article 5 of the Constitution applied to him and he became an Indian citizen at the time of the commencement of the Constitution. This contention on behalf of the appellant cannot be accepted. When the appellant opted for Pakistan, he clearly did

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so with the object of reaching in Pakistan and continuing his service under the Government of Pakistan. In sum, according to his own admission, a final exercise of his option. At that time persons opting were given the choice either to opt finally or to opt provisionally and give their final decision within six months. The appellant chose to make a final option for Pakistan. The mere fact, therefore, that he later decided to come back in February, 1948, cannot be construed as showing that his option for Pakistan was only temporary or provisional and that he had intended to migrate to be a citizen of India and to come back to India. The final exercise of option in favour of Pakistan was then clear proof of the fact that he had migrated to Pakistan and that migration took place after the first day of March, 1947. As a result, his case is covered by Article 7 of the Constitution and the consequence is that Article 5 of the Constitution did not apply to his case at all. It is to be noticed that the provision in Article 7 of the Constitution does not lay down that a person, who became a citizen of India under Article 5 would lose his Indian citizenship or would cease to be a citizen of India if he migrated to Pakistan. The language used in Article 7 is that a person, who migrated to Pakistan after the first day of March, 1947, was not to be deemed to be a citizen of India notwithstanding anything in Article 5. The use of expression "notwithstanding anything in Article 5" means that in such a case, Article 5 does not cease to the benefit of the person at all and he never becomes a citizen of India. In the case of the appellant, therefore, the provisions of the Constitution would show that he never became a citizen of India in accordance with the principles laid down in the Constitution. When the appellant came back to India in February, 1948, he was therefore, not a citizen of India and had never before that date been a citizen of India.

It is in these circumstances that we have to see how and when the appellant acquired Indian citizenship, if at all. For this purpose we have to concern the provisions of the Citizenship Act, 1955. Sections 3 and 4 of that Act confer citizenship on certain persons, but both these provisions apply to persons born on or after the 26th of January 1950. Admittedly, the appellant was

born long before that date and, consequently, sections 3 and 4 of the Citizenship Act, 1935, cannot possibly apply to him. The appellant could, in these circumstances, acquire citizenship only by registration under section 5 of the Citizenship Act, 1935, or by naturalisation, under section 6 of that Act. The case of the appellant is that he acquired Indian citizenship by registration under section 5(1)(a) of the Citizenship Act, 1935. The only reason on behalf of the opposing respondent no. 1 was that the appellant was not married in registration under section 5(1)(a) of the Citizenship Act, 1935, but that his case fell under section 5(1)(c) of the Act. It was further pleaded that, even if the case of the appellant fell under section 5(1)(a) of the Citizenship Act, 1935, section 5(4) of that Act applied to him. The reason for these contentions by the two parties is that a person covered by the provisions of section 5(1)(a) of the Act was about registration from the Collector of a district, whereas the person whose case fell under section 5(1)(c) or section 5(1)(b) of the Citizenship Act, 1935, can obtain registration only from the Central Government. The appellant has filed a certificate of his registration as an Indian citizen granted by the Collector of Rampur dated the 31st of August, 1936. The certificate purports to register the appellant as a citizen of India under section 5(1)(a) of the Citizenship Act, 1935. It is the validity of this certificate that has been made subject matter of controversy between the parties in this case.

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We have already indicated above when discussing the provisions of the Constitution that the appellant did not become a citizen of India at the commencement of the Constitution or when he returned to India in February 1948. Subsequently, he could only acquire citizenship, as has been mentioned above, by obtaining an appropriate certificate under section 5 or section 6 of the Citizenship Act, 1935. The only certificate that has been obtained by the appellant is the one, dated the 31st of August, 1936, granted by the Collector of Rampur. Prior to that certificate, no other certificate was obtained by the appellant. Consequently until this registration on 31st August, 1936, the appellant had never been a citizen of

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India. If he was never a citizen of India, no question could arise of his being deprived of Indian citizenship or of his having renounced Indian citizenship or of his Indian citizenship having terminated under the Citizenship Act 1955. The question of renunciation, deprivation or termination of Indian citizenship could only arise in the case of a person who was already a citizen of India. The appellant having never been a citizen of India prior to the date of his registration, no such question could arise in this case so that it is clear that his case cannot possibly be governed by section 5(3) of the Citizenship Act, 1955. No doubt, the Citizenship Act, 1955, contains provisions in sections 8-9 and 10 for renunciation, deprivation and termination of citizenship, but those provisions could not apply to the case of the appellant who had never been an Indian citizen before his registration on 31st August, 1948. In these circumstances the plea taken on behalf of respondent no. 1 that the case of the appellant was governed by section 5(3) of the Citizenship Act, 1955, clearly fails.

Next we come to the question whether the appellant's case for registration falls under clause (a) or (c) of sub-section (1) of section 5 of the Citizenship Act, 1955. The requirements of clause (a) are that a person seeking registration must be of Indian origin and must be ordinarily resident of India and has been so resident for six months immediately before making an application for registration. We have already stated above that it is the admitted case of the parties that the appellant was born in India and so were his parents so that he is a person of Indian origin. The next requirement that he must ordinarily be resident of India is also satisfied. The evidence on the record discloses that, since his birth, he had lived in India until he migrated to Pakistan in August, 1947. He returned from Pakistan to India in February, 1948 and thereafter he continued to reside in India right up to the 31st of August, 1948 when the certificate was granted to him as also up to the slightly earlier date when he made his application for registration to the Collector of Rampur. It would thus appear that the appellant has lived in India during the whole of his life except

the purpose of the Citizenship Act, 1955 is defined in section 2 (1) of that Act as:

2 (1) (4)—Citizen, in relation to a country specified in the First Schedule, means a person who, under the citizenship or nationality law for the time being in force in that country, is a citizen or national of that country.

Further, section 2 (1) (c) of the Citizenship Act, 1955 defines citizenship or nationality law in the following words:

2 (1) (c)—Citizenship or nationality law, in relation to a country specified in the First Schedule means an enactment of the legislature of that country which, at the request of the Government of that country, the Central Government may, by notification in the official Gazette, have declared to be an enactment making provision for the citizenship or nationality of that country.

There is a proviso to this definition referring to 'the Union of South Africa with which we are not concerned, so that it need not be quoted. It is to be noticed that section 2 (1) (c) which we are being asked to apply in the case of the appellants governs persons who are citizens of a country specified in the First Schedule. The word, citizen, defined in section 2 (1) (4) of the Citizenship Act, 1955, also refers to the countries specified in the First Schedule so that the word 'citizen' used in section 2 (1) (c) has to be given the meaning given in it as the definition contained in section 2 (1) (4). Again in the definition of the word 'citizen' contained in section 2 (1) (4), there is reference to citizenship or nationality law which is itself defined in section 2 (1) (c). The consequence is that section 2 (1) (c) of the Citizenship Act, 1955 can be applied to the case of a person only if that person satisfies the requirements contained in the definition of the word 'citizen' in section 2 (1) (4) and, in deciding this question, the citizenship or nationality law to be taken into consideration must be one satisfying the requirements of section 2 (1) (c) of that Act. In these circumstances, we called upon learned counsel for the respondents (no. 1) to point out

to be any notification by the Central Government in the official Gazette declaring any enactment of the Government of Pakistan to be an enactment making provision for the citizenship or nationality of Pakistan. No doubt, a Citizenship Act was passed in Pakistan, which is designated as the Pakistan Citizenship Act 1951. A copy of that Act was also available to me in print but I never availed for respondent no. 1 was unable to point out or show to the Court any notification by the Central Government in any official Gazette declaring the Pakistan Citizenship Act, 1951, to be an enactment making provision for the citizenship or nationality of Pakistan. The Pakistan Citizenship Act, 1951, does not, therefore, satisfy the requirements of a citizenship or nationality law laid down in the definition in section 2 (1) (i) of the Citizenship Act, 1955, and hence the Pakistan Citizenship Act, 1951, cannot be applied to the case of the appellant and it cannot be held that he was at any time a citizen of Pakistan. It appears that, when the appellant migrated to Pakistan in August, 1947, he lost the benefit of Article 5 of the Constitution and never became a citizen of India. Subsequently he returned to India in February 1948 having very possibly, acquired the citizenship of Pakistan, which citizenship might have been subsequently recognised by the Pakistan Government in accordance with the Pakistan Citizenship Act, 1951. So far as India was concerned no declaration was made in respect of the Pakistan Citizenship Act, 1951, by the Central Government so as to constitute it was a citizenship or nationality law so that for purposes of applying the provisions of the law in force in India and for the purpose of considering the citizenship of the appellant in India, the appellant could not be recognised as a citizen of Pakistan. In February, 1948, therefore, when he came back to India, he was neither a citizen of India nor a citizen of Pakistan. When we have said that he was not even a citizen of Pakistan, we do not mean that Pakistan ought not have recognised him as one of its citizens. What we mean is that India did not recognise him as a citizen of Pakistan. The appellant, not being recognised as a citizen of Pakistan, could not therefore come within the provisions of section 2 (1)

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(c) of the Citizenship Act, 1955, and, consequently, any application for registration made by him could not be governed by the provisions of law. In this case, it is unnecessary to go into the further question whether, if the appellant's case had fallen automatically within the scope of clause (a) as well as clause (c) of sub-section (1) of section 5 of the Citizenship Act, 1955, the registration could have been validly granted by the Central Government only or also by the Collector. In the case of the appellant, section (1) (c) of the Citizenship Act, 1955, does not apply and, as we have held above, he does satisfy all the requirements of section 5(1) (a) of that Act. He could, therefore, be registered as a citizen of India by the Collector of Raipur who was the prescribed authority and, hence, the certificate of registration as a citizen of India granted to the appellant on the 7th of August, 1956, by the Collector of Raipur conferred citizenship of India on the appellant. The election took place subsequent to that date and, consequently, on all relevant dates he was a citizen of India and, therefore, there was no bar to his being chosen to fill a seat in the U. P. Legislative Council under Article 129 or Article 131 of the Constitution. The ground on which the election petition was allowed by the Election Tribunal against the appellant was, therefore, he decided in favour of the appellant and he is entitled to succeed in this appeal.

As we have mentioned at the outset, respondent no. 1 had taken various other grounds for challenging the election of the appellant, the grounds being those of commission of various corrupt practices. We called upon learned counsel for respondent no. 1 to rely on as if he wanted to support the decision of the Election Tribunal on any of those grounds and, if so, to put forward his arguments and evidence in that the findings recorded by the Election Tribunal in favour of the appellant on those points are liable to be set aside in this appeal. The learned judge of the Election Tribunal had to judge the evidence of the witnesses on those various grounds and he has given full and cogent reasons for reaching findings in all those grounds in favour of the appellant. Learned counsel for respondent no. 1

was unable to advance any arguments which could possibly induce us to differ from the view taken by the Election Tribunal and to set aside any of those findings which must be given their due weight, as the Judge, who recorded those findings, had the benefit of seeing the witnesses in the witness-box. It does not appear to be necessary in these circumstances for us to examine those findings in detail.

The appeal is consequently allowed, the order of the Election Tribunal set aside and the election persons cited by respondent no. 1 is dismissed with costs in this Court as well as before the Election Tribunal. The costs in this Court as well as before the Election Tribunal shall be Rs 200 in this Court and the same amount for the proceedings before the Election Tribunal.

Appeal allowed

APPELLATE CIVIL

Before Mr. Justice Chatterjee and Mr. Justice Tahir

KESHAV GUPTA (Appellant)

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January 11

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GHAFUR ALI KHAN (Respondent)

Issue: Petition—Proceedings in, whether of a civil nature for purposes of appeal to the Supreme Court—Constitution of India 1950 Art. 133—Code of Civil Procedure 1908 ss. 9, 109 and 133—Representation of the People Act 1951 ss. 105A and 105B. Petitioner—Stops up to which restriction is imposed on party—Stands for filing a writ in a petition for leave to appeal to the Supreme Court—Rules of Court, 1952 Ch. I r. 3—Code of Civil Procedure 1908 Ch. 13 r. 8.

Appeal to the Supreme Court—Certificate from High Court for— When the case is a fit case for appeal to the Supreme Court—Constitution of India, 1950 Art. 133 (1) (c).

The right to move for or be moved to a court as the legislature or municipal bodies is a civil right and the legislature for so, having no securing the same is a civil proceeding within the meaning of Art. 133 of the Constitution. A petition for leave to appeal to the Supreme Court from the judgments of the High Court under the Representation of the People Act 1951 is accordingly maintainable under the said Article.

for the respondent and refrain from voting for the applicant on the ground of community and religion; that the respondent, his agents, workers and supporters made extensive use of various posters bearing the photograph of Malwana Gumbi and his school Congress logo for the (the Congress organisation should be dissolved), and thus made the use of a national symbol for the purpose of reducing the votes of the applicant and increasing those of the respondent, and that the respondent did not maintain accounts as required by section 77 of the Representation of the People Act.

The Election Tribunal held that the respondent was guilty of the commission of the corrupt practices of making systematic appeals to the Muslim voters to vote for the respondent on the ground of his community and religion, that the voters were made to believe that they would become objects of Divine displeasure and spiritual misery if they did not vote for the respondent, and that a pamphlet entitled *It is a Congress ke phir vote detya jaye*, (should votes be cast in favour of the Congress candidate again) contained false statements and misrepresentations and preached hatred against the members of the Congress organisation, and interfered with the free exercise of the electoral right of the voters. The points raising other grounds were decided against the applicant, but the election of the respondent was set aside to be read on the findings mentioned above. The respondent filed an appeal to the Court and the Court did not agree with the Election Tribunal in its decision on any of the points decided by it against the respondent and allowed the appeal. The Court agreed with the decision of the Tribunal with respect to the points which were decided by the Tribunal in favour of the respondent and the correctness of which was challenged in appeal before the Court. The applicants now want to take the case to the Supreme Court.

No arguments were addressed to us at the time of the hearing of the application that the applicant was entitled to a certificate under clauses (a) and (b) of sub-Article (1) of Article 133 of the Constitution, though the respondent mentioned these clauses also. The reason

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for that appears to be that this is not a case in which it can be said that the amount or value of the subject-matter in dispute in the court of first instance and in dispute on appeal was Rs 20,000 or more. Even in the application it is nowhere alleged that the value of the subject-matter in dispute was Rs 20,000. During the arguments the learned counsel only urged that the case raised questions of general and public importance and was a fit case for appeal to the Supreme Court. We then proceeded to consider whether the application is entitled to a certificate under Article 133 (1) (c) of the Constitution which is as follows—

An appeal shall lie to the Supreme Court from any judgment, decree or final order in a civil proceeding of a High Court in the territory of India if the High Court certifies—

(a)

(b)

(c) that the case is a fit case for appeal to the Supreme Court of India.

The learned counsel for the respondent has urged three points in opposing the application. He has contended (1) that this Court has no jurisdiction to grant a certificate in the judgment or final order passed by the High Court was not in a civil proceeding; (2) that the application for the grant of a certificate was not properly presented to the learned counsel who presented it, did not file his Vakalatnama along with his application; and (3) that the case did not raise any substantial questions of law of general or public importance. The learned counsel for the applicant in the alternative contended that he was entitled to a certificate under sections 199 and 113 of the Code of Civil Procedure.

The first question that arises for decision is whether this Court has jurisdiction to grant the certificate and that depends upon the interpretation of the words used proceeding. The learned counsel for the applicant has contended that the proceedings arising out of this case relate to matters concerning disputes as civil

rights and then give rise to civil proceedings. According to the learned counsel some civil rights have been recognised by common or general law of the land and other civil rights are conferred by the statute. The fact that a right has been conferred by the statute does not imply that the right is not of a civil nature. The learned counsel for the respondent has argued that the right to franchise or to seek election to a legislative body is not a civil right but is in the nature of a political right which has been conferred upon the citizen by the Constitution and the Representation of the People Act. The right is not of a civil nature but is a special right created by a statute.

The other Articles of the Constitution which may be considered in this connection are Articles 132, 134 and 135. Article 132(1) is in the following words:

An appeal shall lie to the Supreme Court from any judgment, decree or final order of a High Court in the territory of India whether in a civil, criminal or other proceeding, if the High Court certifies that the case involves a substantial question of law as to the interpretation of this Constitution.

Article 134 (1) provides for an appeal to the Supreme Court from any judgment, final order or sentence in a criminal proceeding of the High Court. Article 135 (1) empowers the Supreme Court to grant special leave to appeal from any judgment, decree, determination, sentence or order in any case or matter passed or made by any court or Tribunal in the territory of India excepting a court or Tribunal constituted by or under any law relating to Armed Forces.

From the above provisions it would appear that if a case involves the determination of a substantial question of law as to the interpretation of the Constitution the High Court is required to give the certificate under Article 132(1) irrespective of the fact whether the judgment of the High Court was delivered in a civil, criminal or other proceeding. Article 135(1) then does not divide all the proceedings between civil and criminal and encompasses other proceedings which are neither civil nor criminal. Article 135(1) provides for appeal

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in a civil proceeding and Article 226(1) is a criminal proceeding. There is no permission, at all, to entertain by the High Court as a proceeding which is neither civil nor criminal. The powers of the Supreme Court under Article 226 to grant special leave are one of the widest amplitude. Under Article 226 (1) it shall be entitled to grant a writ only if the judgment of this Court can be said to have been given in a civil proceeding.

The expression "civil proceeding" has not been defined in the Constitution and the expression has to be given its ordinary dictionary meaning. The word "civil" is derived from the Latin word "civilis" meaning a citizen. The word "civil" when used as an adjective so far has been defined in the Shorter Oxford Dictionary as "pertaining to the private rights and interests of a citizen as distinguished from criminal, political, etc." The word "political" has been given the meaning as "belonging or pertaining to the State, its Government and policy; public; civil, of or pertaining to the science or art of politics." In Brown's Judicial Dictionary the expression "civil proceeding" is given the meaning as "a proceeding for the recovery of individual rights, or redress of individual wrong." The meaning of the word "political" as given in Shorter Oxford Dictionary does not rule out the possibility of a political right being also considered as a civil right. In many democratic countries the right of franchise is considered to be a very valuable right and though the exercise of this right results in electing members to legislative bodies which have political power, the nature of the right is essentially of a civil character.

No direct authority on the point has been produced before us comprising a decision of the Andhra Pradesh High Court, which we shall presently consider. The meaning of the expression "civil proceeding" comes up for consideration in two reported cases of this Court, namely, *State of U. P. v. Mubtizer Singh* (1) and *Bry Lal Sen v. State of U. P.* (2). In both these cases the proposition was that proceedings under Article 226 of the Constitution were not "civil proceedings" within the

(1) A. I. R. 1957 AIR 524.

(2) A. I. R. 1955 AIR 105.

meaning of the expression is used in Article 133(1) of the Constitution. In the first case there was a difference of opinion between the members constituting the Bench and in the second case both the Judges, by separate but concurrent judgments held that it would depend on the nature of each case decided under Article 133 of the Constitution whether the proceeding giving rise to it was civil, criminal or other proceeding. If the order passed by the High Court is in regard to a proceeding which relates to determination of individual rights or redress of individual wrongs then it would be an order passed in a civil proceeding. But neither of the above two cases is of any real help in determining the above-mentioned question that arises in the present case. In neither of these cases did Court had to consider whether a right to seek election to a legislative body is a civil right or not.

The Privy Council had to deal with a point of some what similar nature in the case of *Harold Hays Newman v Municipal Corp* (1). The Municipality of Haverh had been superseded by an order of the Governor of Bengal and the Governor directed that Harold Hays Newman should continue and perform all the powers and duties which might be assigned or performed by or on behalf of the Chairman and the Commissioners during the period of the suspension. The legality of the order appointing Harold Hays Newman to act as the Chairman and Commissioners during the period of the suspension of Haverh Municipality was challenged before the High Court at Calcutta. The High Court issued a rule nisi calling upon the applicant to show cause why an injunction in the nature of *quia warrant* should not be refused against him. Subsequently the rule was made absolute by the High Court. An appeal was taken to the Privy Council against the order of the High Court and the main question decided by the Privy Council was that the High Court had no power to issue the rule, because it had not inherent the personal jurisdiction of the Supreme Court over certain classes of persons residing outside the territorial limits

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of its ordinary original civil jurisdiction. While considering the above question, the Privy Council had to see whether the jurisdiction exercised by the High Court was ordinary original and civil jurisdiction. The Privy Council held:

"It cannot be disputed that the issue of such writs is a matter of original jurisdiction. As to its being of a civil nature, it was held as long ago as 1788 *King v. Foxcroft*(1): that information on the nature of *quo warranto* is in the nature of a civil proceeding so that a writ may be ordered."

They then went on to consider the question whether it was within the ordinary jurisdiction of the High Court. The decision is an authority for the proposition that information in the nature of *quo warranto* respecting the legal authority of a person acting as a Municipal Councillor is a proceeding of a civil nature. The question before us is of a similar nature and we think that for the same reason the proceeding relating to the legality of the declaration of a person to be a duly elected member of the legislature is also of a civil nature.

Section 8 of the Code of Civil Procedure provides that the courts shall have jurisdiction to try all suits of a civil nature excepting suits of which cognizance is either expressly or impliedly barred. The decision under this section and section 41 of the specific Relief Act would be relevant and the weight of authority is overwhelmingly in favour of the view that a right to seek election to a Municipal Board or a Municipal Corporation is a right of a civil nature. The same principle we think, should apply to a right to seek election to the legislatures of the State and the Union.

In *Abdulsat Singh v. Abdul Gaffar*(2) it was held that the plaintiff could bring a suit in the civil court for the declaration that he was a duly elected member of a local body. In *Ataul Haq v. The Chairman*(3) it was held that the plaintiff could bring a suit in the civil court for a declaration that he was a qualified voter and could have his name entered in the register of voters

(1) 1788 2 Term Rep. 611. (2) 1885(2) L. R. 10 Q.B. 191.

(3) 1915(3) L. R. 48 Q.B. 201.

of a Municipal Board. The same view has been expressed in the case of *Munuddin Khan v. Jeeba Rallabha Datta* (1). In *Geopeth Chandra v. Benode Lal Das* (2), it was held that the plaintiff was entitled to bring a suit in a civil court for a declaration that his nomination paper was illegally rejected and the defendant was not duly elected to the Municipal Board. The view of the Calcutta High Court thus appears to be consistent with such a suit is of a civil nature and can be brought in the civil court.

A similar view has been expressed by the Bombay High Court in the case of *R. P. Narayan v. Municipal Corporation* (3), by the High Court of Madras in the case of *A. Devanarayana Naidu v. Joseph E. Barker* (4), and by the Patna High Court in the case of *Jashu Singh v. Pradhabai Sharma* (5).

The learned counsel for the respondents relied on certain observations of the Supreme Court in the case of *Ponnuswami v. Returning Officer* (6). Reference was placed on the following passage which occurs at page 196 of the Report:

The right to vote or stand as a candidate for election is not a civil right but is a creature of statute or special law and must be subject to the limitations imposed by it.

It has been argued that their Lordships have laid down that the right to vote or stand as a candidate for election is not a civil right. After giving a more careful consideration to the argument and the facts of the case in which the observation has been made, we find ourselves unable to accept the interpretation put upon the above passage by the learned counsel for the respondents. The passage occurs in the well-known case where the Supreme Court has laid down that the word 'election' has been used in Article 329 (b) of the Constitution in the wider sense as covering the entire process culminating in a candidate being declared elected. They held

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(1) 1953 L. R. 10 Cal. 409.

(2) 1954 L. R. 40 Bom. 339.

(3) 1954 L. R. 1954 (B) 339.

(4) 1954 L. R. 1954 (M) 409.

(5) 1954 L. R. 1954 (Pat) 171.

(6) 1952 L. R. 1952 (S) 409.

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that the process of election began earlier than the promulgation of the constitution paper and Article 328 (b) prohibited all courts from interfering with the orders passed during the course of the elections. Even after that the objections could be taken only by means of an election petition. It was accordingly held that no writ process under Article 226 of the Constitution could be filed during the course of the election. The learned Judge had not to consider whether the writs civil proceedings in Article 226 (1) of the Constitution included proceedings arising out of an election matter. Coming now to the observation relied on by the learned counsel, the observation was made after a reference to a speech of a Lord Chancellor of England in the case of *Turbervile v. Lindsay* (1). In the speech the Lord Chancellor had said that the subject matter of the legislation was extremely peculiar which concerned the rights and privileges of the electors and of the Legislature Assembly and that right had been jealously guarded by the Assembly. It would be surprising with regard to the rights and privileges of this kind, if it were to be found that in the last resort the determination of them no longer belonged to the Legislative Assembly or to the Supreme Court, which the Assembly had put in its place but belonged to the Crown or Council. It was accordingly held that no appeal lay to the Privy Council in a case of this kind. The said observation was not applicable to the Supreme Court of India. The learned Judges of the Supreme Court then said that one of the points which emerged from the above discussion, was that the right to vote or stand as a candidate for election was not a civil right but was a creature of the statute or special law and must be subject to the limitations imposed by it. What their Lordships clearly meant was that the right to vote or stand as a candidate was not the ordinary type of civil or common law right but was a right which had been created by a special statute. The words civil right were used in contradistinction to a right created by a statute but it was not meant that no right created by a statute could give rise to a civil right.

The learned counsel for the respondents also relied on another decision of the Supreme Court reported in the case of *Isaiah Malappa Basappa v. Datta Ramnary Dnyappa* (1). In this case their Lordships have held that the provisions of Order XXIII, rule 1 of the Code of Civil Procedure do not apply to election petitions and it is not open to a petitioner to withdraw or abandon a part of his claim once an election petition has been presented to the Election Commission. The observations relied upon by the learned counsel are to the effect that an election contest is not an action at law but is a statutory proceeding unknown to the common law, and that the court possesses no common law power in such a contest. It is not a matter in which the only persons interested are the candidates, but the public also is substantially interested in the result. An election petition is not a suit between two persons but a proceeding in which the constituency itself is the principal party interested. There is no question that the above observations lay down the accepted view of law concerning the nature of an election petition. But the observations do not militate against the view that the rights determined in an election petition are rights adjudicated upon in a civil proceeding. We do not think that in the case of *Isaiah Malappa Basappa* (1) and in the Supreme Court cases relied upon in that case their Lordships of the Supreme Court meant to lay down that an election petition does not determine civil rights.

A Bench of the High Court of Andhra Pradesh in the case of *P. P. Gani v. Duppala Sati Devi* (2), has held that no certificate can be granted by a High Court under Article 133 (1) of the Constitution against the judgment passed in an appeal under section 134 A of the Hyderabad Act, because the election proceedings did not come within the meaning of the expression 'civil proceeding'. This case fully supports the contention of the learned counsel for the respondents and is the only case brought in our notice on this point, but, after having respectively

(1) A. I. R. 1958 S.C. 288.

(2) A. I. R. 1958 A. P. 441.

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considered the judgment of the learned Judge, we find ourselves unable to agree with that view. The Indian Federal High Court has based its decision on the passage quoted by us above from the decision of the Supreme Court in the case of *Premnath* (1). We have come to the conclusion that the passage in the context in which it has been used, only means that a right of this nature was not a common law right, but a right created by a statute. After a most careful consideration of the questions we have arrived at the conclusion that the proceedings arising out of an election petition are proceedings of a civil nature and that Court under Article 134 (1) of the Constitution can certify such a case to be a fit case for appeal to the Supreme Court.

The next contention of the learned counsel for the respondent was that the application for the grant of a writ had not been properly presented, because it was not accompanied by a Vakalatnama executed by the applicant in favour of the learned counsel. We looked over the record of the appeal out of which the present application arose, and we found that the learned counsel for the applicant had filed his Vakalatnama in the appeal. The terms of the Vakalatnama are very wide conferring, amongst others, the following powers on the learned counsel:

The aforesaid gentleman may file on my behalf plaint, written statement, grounds of appeal or revision etc. of every kind and file copies of all other kinds of applications and documents, and file a compromise and file an application in that connection and support or take singly or jointly all proceedings connected therewith up to the time of full satisfaction of the decree and if necessary engage any other solicitor.

Power has been conferred on the counsel to file all kinds of applications and that power is to continue till the final stage of the case, namely the execution of the decree. We accordingly think that it was not necessary for the learned counsel to file another Vakalatnama along with this application. We think he was authorized by the previous Vakalatnama, filed in the appeal

to present this application in well. We accordingly decide this point also against the learned counsel for the respondent.

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The learned counsel for the applicants had argued on the alternative that he was entitled to a writ under sections 114 and 115 of the Civil Procedure Code. It is doubtful if any certificate can be granted under the above sections of the Code of Civil Procedure, in view of the language used in sections 114 A(2) and section 115B of the Representation of the People Act. But we do not consider it necessary to decide this point.

We now come to the last question, whether this case raises any question of general and public importance and should be declared to be a fit case for appeal to the Supreme Court. After having heard the learned counsel for the parties, we have arrived at the conclusion that two of the questions decided by the High Court are questions of law of general and public importance and deserve an authoritative decision by the highest Court in the country. One of the questions is when an appeal is filed in favour of a candidate or in refusal from voting in favour of the other can be said to be an appeal made on the ground of religion or community. In this case one of the handfuls contained the following appeal:

And this is the advice of respected Maulana, (Maulana Husain Ahmad Madani), who because he could never advise to vote for a Government which has treated the respected leader by search of Darul Uloom Deoband and has further suppressed Urdu which is our mother tongue. Therefore we appeal to the Muslim brothers of Thana Husain to help Ghayur Ali Khan to win by casting their votes in his favour."

The other handful contained the following appeal:

Should such Congress be voted for once again? Whose police has treated respected Hazrat Sheikh Maulana Sayed Husain Ahmad Madani by making a search raid on Darul Uloom Deoband

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Whose Government of U P has mercilessly
persecuted lot of persons to speak in Hindi by not
recognising Urdu as one of the regional languages.

Whose leadership used to attract Muslim votes
by means tactics of spreading the Muslim conspiracy
by referring to the Kashmir problem.

The Election Tribunal had held that the respondent was responsible for the publication of both the handbills but this Court did not agree with that finding as regards the first handbill, the relevant portion of which has been quoted above. The question whether the respondent was responsible for the publication of this handbill was decided in favour of the respondent and the decision was based on a misreading of evidence. It was a decision on a question of fact. But as regards the second handbill this Court agreed with the decision of the Election Tribunal that the handbill had been printed at the instance of the respondent. We have quoted the relevant portions of the handbill, and the Bench, which decided the appeal, took the view that the handbill contained only a distortion of the actions or statements of a political party in power and did not amount to making of an appeal on the ground of religion or community. The first and third questions referred to improper actions of certain individuals, which were likely to be possessed even by members of the other community and the second passage was concerning the language policy of the political party in power in the State of U P. But such speeches are made during the elections and questions have arisen in many of the election petitions whether statements of this kind amount to appeals on the ground of religion or community.

The other question is whether Mahatma Gandhi's photograph can be called a national symbol. The respondent had made use of posters containing Mahatma Gandhi's photograph but the Bench held that Mahatma Gandhi's photograph could not be called a national emblem or symbol, so that the use of it did not amount to the commission of a corrupt practice. Nor did the publication of Mahatma Gandhi's alleged statements that

the Congress organisation should be dissolved subject to the nature of order refusing.

The third question is whether the sanction by the candidate himself to keep and maintain accounts as provided by section 77 of the Representation of the People Act was a corrupt practice as defined by section 123(5) of the Act. The Bench held that the corrupt practice mentioned in section 123 (5) was confined to the disobedience of sub-section (2) of section 77 and not in disobedience of the other two sub-sections. The Bench took the view that the corrupt practice was the authorising or incurring of expenditure above the limits prescribed by the rules and the sanction to keep and maintain accounts by the candidate himself did not fall within the purview of section 123 (5) of the Act.

The above are questions of general and public importance on which an authoritative pronouncement is called for. We accordingly think that this case is a fit one for appeal to the Supreme Court and we allow the application and grant a certificate to the above effect under Article 133(1)(c) of the Constitution.

Application allowed.

(FULL BENCH) CIVIL MISCELLANEOUS

Before Mr. Justice Bhargava, Mr. Justice Chatterjee and Mr. Justice Upadhyaya.

JAI KISHAN SRIVASTAVA (Petitioner)

1959

May, 11

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INCOME TAX OFFICER, KANPUR *and another*
(Respondents-Factories)

Income taxing assessment during war period—Provision for assessment on re-assessment—Constitutionality of section Income Tax Act 1922 s 34(1A)—Constitution of India, 1950, Art. 14.

Power of assessment—Exercise of, by the Income Tax Officer—Whether based on wronggoing principle of natural justice—Validity of proceedings.

The petitioner had been duly assessed in assessment for the assessment years 1945-46 to 1948-49. In December 1954 he

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received from income under a 34(1A) of the Income Tax Act for calculating a further amount of his total income for each of the said assessment years. In a petition challenging the validity of the proceedings.

And (a) (Per *Memorandum and Conclusions* J.) (hereinafter referred to as 34(1A)) of the Income Tax Act had not under the prohibition contained in Art. 34 of the Constitution and was a valid part of legislative enactment.

(a) the amount provided against under a 34-(1A) had with regard to appeal, revision or reference, the same rights as was under a 34(1) since notwithstanding the difference in the phraseology of the corresponding provisions in the two sections 34 and 34(1A) and therefore the provisions of this Act (excepting those contained in the (b) and (c) of the proviso to sub (1)) shall so far as may be, apply accordingly to the former and the provisions of this Act shall so far as may be, apply accordingly to it if the same was a notice issued under section 22(2) in the latter a 34(2) was equally applicable to both cases.

(b) the difference resulting from the fact that the general rule under a 34(1) was subject to a prescribed period of limitation while that under a 34(1A) was free from any such restriction fell within the limits of permissible class legislation inasmuch as the latter was meant for a special class of cases; whose income during the war period amounted to a lakh of rupees or more.

(Per *Memorandum* J.)—that the additional words in the proviso were a notice issued under a 34(2) as a 34(1) were not superfluous and could not be interpreted under a 34-(1A) with the result that the provisions regarding appeals etc. could not be available to an assessee proceeded against under the latter section. The provisions of all the proceedings under a 34(1A) therefore attracted Art. 34 of the Constitution and were accordingly invalid.

Observations of the Supreme Court in *Shree Mahadevi Mills Ltd. v. Asst. Commr. of Income Tax* (1) relied on by *Memorandum* J. explained on the ground that the relevant provision was amended and could not in any manner be used to have been decided.

(2) (Consequently) that the proceedings before the Income Tax Officer were no longer valid. It is however difficult to see how the Income Tax Officer may be said to have a bona fide personal interest in the matter of assessment so as to exclude the principle of natural justice that no man can be a judge in his own cause and even assuming it to be so, the defect is cured by a provision for appeal and hearing before higher

and wholly independent interests. Moreover the principle of personal justice cannot be started for avoiding the validity of an express provision in the contrary to do, for

DeLapelle v. Registrar, Soc. & Indus. Pensions and Transp. Commission (1) distinguished.

Civil Miscellaneous Writ No. 197 of 1950 connected with Civil Misc. Writ No. 189 of 1950.

The facts appear in the judgments.

G. S. Pothak, G. P. Tandon and R. S. Pothak for the applicants.

Jagdish Swarup and Gopal Bhatia for the opposite parties.

REMARKS, J.—These two connected writ petitions under Article 226 of the Constitution have been referred for decision to the Full Bench as they raise important questions relating to the validity of certain provisions of the Income Tax Act, hereinafter referred to as the Act. For convenience I am giving the facts of one of these writ petitions, which is numbered 197 of 1950 in which the petitioner is Jai Bahadur Srivastava. The petition arose, on the basis of returns submitted by him to the Income tax Officer. Kamper was assessed to tax for the assessment years 1948-49 to 1949-50. Thereafter on the 17th of May, 1948 he received notice from the Secretary, Income tax Investigation Commission, by which he was informed that his case had been referred to the Commission under section 5(1) of the Taxation on Income Investigation Act 1947. By these notices the petitioner was directed to furnish to the Income tax Investigation Commission certain information, and to comply with certain other requirements mentioned therein. The petitioner under the impression that the Commission had authority and jurisdiction to proceed with the investigation of the petitioner's case, supplied most of the information sought and complied with the various requirements. The Income tax Investigation Commission did not, however, proceed to the stage of issuing any charges against the petitioner or giving a hearing to him and was wound up before the proceedings could be completed.

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Thereupon on the 29th of December, 1956, the petitioner received seven notices purporting to be issued under section 34(1 A) of the Act from the Income tax Officer, district 1 (ii) Kangra, opposite party no 1 calling upon him to submit returns of his total income assessable to tax for the seven assessment years mentioned above. The notices contained a mention that, in case the petitioner failed to file the returns as required, he was liable to an *ex parte* assessment under section 22(1) of the Act and also to penalty and prosecution. Thereupon, the petitioner sent a letter dated the 29th of January, 1957, asking for two months' time to obtain legal advice and to prepare returns. Time was allowed to him up to the 28th of February 1957. The petitioner asked for further time by his letter, dated the 28th of February, 1957 when he was informed by the Income tax Officer, Central Circle 1, Kangra, opposite party no 1, that his case had been transferred to his file and that no further time could be allowed, so that the petitioner must file his returns within three days. The petitioner made further representations and then he was allowed time up to the 25th of March 1957. The petitioner sent a letter, dated the 24th of March, 1957 requesting the opposite party no 2 to supply him with the returns for the issue of notices under section 34(1 A) of the Act as recorded by him and forwarded to the Central Board of Revenue for their sanction and to grant further time to the petitioner. But by his letter dated the 31st of March, 1957, opposite party no 2 refused these requests. Thereupon, the petitioner, under protest filed his returns of income. The petitioner also pointed out to opposite party no 2 that according to him, the notices were bad in law and unsustainable and requested the opposite parties, viz., both the Income tax Officers, to recall the notices and to abandon the proceedings being taken under them; but the opposite parties did not accept this request. Thereupon, the petitioner moved this petition on the 23rd of April 1957 and this Court, when admitting the petition, passed an interim order restraining the opposite parties from taking any steps in pursuance of the notices given to the petitioner, under section 34(1 A) of the Act.

The validity of the notices and the proceedings being taken under these notices were challenged by the petitioner on a number of grounds, but only two grounds need detailed consideration in this case because, though the other grounds were not given up by Mr. Pashuk, who argued the case on behalf of the petitioner, he did not advance any arguments before us, in respect of these grounds. The two grounds for challenging the notices and the proceedings which were urged before the Full Bench were: (1) that section 34(1 A) of the Act was ultra vires Article 14 of the Constitution as it dealt equally before the law because persons, who could be dealt with under section 34 (1 A) could also be dealt with under section 34(1) of the Act and (2) that the proceedings, which were being taken by the Income-tax Officer, were of a judicial or quasi-judicial nature and the Income-tax Officer was a person, who had a bias because he was the Central Board of Revenue, under whom he was employed, was interested as a party in these proceedings. These are the two points that mainly need consideration by us.

In considering the first point, which has been raised before us section 34 which has to be interpreted by us, must be read as it stood in the year 1954 when these seven impugned notices were issued to the petitioner. In section 34 (1) the relevant provision is that which relates to clause (a) and which, after creating the para relevant to clause (3), reads as follows:

34. (1) B—

(a) the Income-tax Officer has reason to believe that by reason of the omission or failure on the part of an assessee to make a return of his income under section 22 for any year or to disclose fully and truly all material facts necessary for his assessment for that year, income, profits or gains chargeable to income-tax have escaped assessment for that year, or have been under-assessed, or assessed at too low a rate, or have been made the subject of excessive loss, or depreciation allowance has been computed,

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he may in cases falling under clause (d) at any time within eight years serve on the assessor, or, if the assessor is a company, on the principal officer thereof, a notice containing all or any of the requirements which may be included in a notice under sub-section (2) of section 22, and may proceed to assess or re-assess such income, profits or gains or to compute the loss or depreciation allowance, and the provisions of this Act shall, so far as may be, apply accordingly as if the notice were a notice issued under that sub-section.

Provided that—

(i) the Income tax Officer shall not issue a notice under this subsection, unless he has recorded his reasons for doing so and the Commissioner is satisfied on such reasons recorded that it is a fit case for the issue of such notice;

(ii) the tax shall be chargeable at the rate at which it would have been charged had the income, profits or gains not escaped assessment or full assessment, as the case may be; and

(iii) where the assessment made or to be made is an assessment made or to be made on a person deemed to be the agent of a non-resident person under section 68, this subsection shall have effect as if for the period of eight years a period of one year was substituted.

Explanation—Producers before the Income tax Officer of account books or other evidence from which material facts could with due diligence have been ascertained, by the Income tax Officer, will not necessarily amount to disclosure within the meaning of this section.

This was the language of section 24(1)-(d), as introduced by the Income Tax and Business Profits Tax (Amendment) Act, 1948. In the year 1963, the Income Tax (Amendment) Act, 1963 was passed and it came into force on the 17th of July, 1964. By this Amendment Act, amongst other changes introduced in the Act,

a new subsection (1A) was introduced in section 34 which reads as follows:

(1 A) If in the case of any assessee the Income tax Officer has reason to believe—

(i) that income, profits or gains chargeable to income tax have escaped assessment for any year in respect of which no relevant returns have been made wholly or partly within the period beginning on the 1st day of September 1939, and ending on the 31st day of March, 1940, and

(ii) that the income, profits or gains which have so escaped assessment for any such year or years assessed, or are likely to amount, to one lakh of rupees or more

he may, notwithstanding that the period of eight years has expired in respect thereof, serve on the assessee, or if the assessee is a company, on the principal officer thereof, a notice containing all or any of the requirements which may be included in a notice under sub-section (2) of section 33, and may proceed to assess or reassess the income, profits or gains of the assessee for all or any of the years referred to in clause (i), and thereupon the provisions of that Act (excepting those contained in clauses (a) and (a) of the proviso to sub-section (1) and in sub-sections (2) and (3) of this section) shall, so far as may be, apply accordingly.

Provided that the Income tax Officer shall not give a notice under this subsection unless he has recorded his reasons for doing so and the Central Board of Revenue is satisfied on such reasons recorded that it is a fit case for the issue of such notice.

Provided further that no such notice shall be issued after the 31st day of March, 1940.

On the language of these two provisions Mr. R. S. Pathak, who very ably argued this case before us, urged that the Legislature had introduced two very important discriminations in the manner of procedure and limitations applicable to cases of persons who may be dealt with under one provision or the other. In the case of a

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person dealt with under section 34 (1) (a), a notice could be issued only within eight years of the end of the assessment year to which the notice related and, upon the issue of such a notice, the Income tax Officer, in proceedings to assess or reassess the income, profits or gains, was to be guided, as the manner of procedure by the procedure laid down in section 23 and the following sections of the Act. On the other hand, in the case of a person on whom notice is issued under section 34 (1) (a), there would be no period of limitation for issue of the notice and the procedure applicable to persons prosecuted under section 34 (1) (a) would not apply, so that such a person would not have the benefit of the procedure given in section 23 and the subsequent sections of the Act and would also not have a right of appeal to the Appellate Assistant Commissioner or the Income tax Appellate Tribunal, nor a right to seek a reference to the High Court. It was further urged that persons, whose cases may be covered by section 34 (1) (a) of the Act, would also be governed by the provisions of section 34 (1) (a) of the Act, so that two different procedures may be applied at the choice of the revenue authorities to two persons similarly situated.

The interpretation by learned counsel for the petitioners that the procedure applicable to proceedings for assessment or re-assessment or re-computation under section 34 (1) (a) of the Act would be that laid down in section 23 of the Act is undoubtedly correct. Under section 34 (1) (a) of the Act, the Income tax Officer is fully authorized to serve a notice in the circumstances mentioned therein, on the assessee or the principal officer of the company if the assessee is a company, which notice may contain all or any of the requirements which may be included in a notice under sub-section (2) of section 23 and, upon the service of such a notice, the Income tax Officer is authorized to take proceedings for assessment, or re-assessment or re-computation. Thus, unless the decision that the provisions of the Act shall, so far as may be, apply accordingly as if the notice were a notice issued under sub-section (2) of section 23 of the Act¹ This section thus contains a fiction of law which has

been introduced for the purpose of making the procedure laid down in section 22 of the Act applicable to the proceedings for assessment, reassessment or re-computation taken by the Income-tax Officer in pursuance of a notice issued under section 134(1)(a). The fiction of law is introduced by using the words "as if the notice were a notice issued under this subsection. Clearly, the effect of this fiction of law is that even though a notice under section 134(1)(a) is different from a notice under subsection (2) of section 22 of the Act, the Income-tax Officer in taking proceedings for assessment, re-assessment or re-computation, has to comply with the provisions of the Act which apply when he takes proceedings for assessment in pursuance of a notice under subsection (2) of section 22 of the Act. The further inference of learned counsel was that in section 134(1)(a) no such fiction of law has been introduced by the Legislature. In this provision of law the circumstances under which a notice can be issued are slightly different and limited. But, when a notice has been served in accord-
ance with that provision of law, the power granted to the Income-tax Officer as to proceed to assess or re-assess the income, profits or gains of the assessee for the years in question. Then it is laid down that, excepting those contained in clauses (1) and (2) of the proviso to subsection (1) and in sub-sections (2) and (3) of this section, shall, so far as may be apply accordingly. In using this language, the Legislature made a deplorable mistake as it did not plainly lay down that a notice issued under section 134(1)(a), by fiction of law, equated with a notice under subsection (2) of section 22 of the Act and it was urged that an inference should be drawn from this occasion that the provisions of section 22 of the Act would not apply to proceedings for assessment or re-assessment under section 134(1)(a) of the Act. The further inference, which learned counsel drew, was that, since the procedure laid down in section 22 could not be applied, the Income-tax Officer, in proceeding to make the assessment or re-assess same, would have to discharge his functions as a quasi-judicial tribunal in accordance with the principles of natural justice. When called upon to explain what

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similarly declined also even. In order to achieve that purpose the Legislature when introducing section 34(1 A) in the Act did not desire that persons, against whom proceedings are taken under the Act, should be able to avail of all the ordinary remedies provided in the Act and stated that the Income tax Officer should be able to take proceedings for assessment or re-assessment of such persons with as much success as the Income tax Investigation Commission could do under Act XXV of 1948. It was thus contended that the terms of Sec. 34 which had been introduced in section 34(1)(c) was deliberately removed by the Legislature with the obvious object and consequently the purview of section 34(1 A) of the Act should be interpreted as not including in it the applicability of the procedure for assessment laid down in section 23 of the Act and the consequent applicability of the provisions contained in sections 31, 33 and 35 of the Act.

It appears to me that there are several reasons why such an interpretation should not be accepted. The first and the most important reason is that, in my opinion, the language used in sections 23, 34(1)(a) and 34(1 A) of the Act by itself leads to the interpretation that, even in respect of proceedings for assessment or re-assessment under section 34(1 A), the procedure laid down in section 23 has been made applicable and so the the provisions of sections 31, 33 and 35 of the Act have been made applicable to those proceedings. In section 23 of the Act the Legislature has laid down the procedure which the Income tax Officer has to follow in proceedings for assessment of the income, profits and gains of an assessee and for determination of the tax payable by him. Under section 34(1)(a), the proceedings which the Income tax Officer is authorized to take also involve assessment, and, of three different kinds. Firstly, he can proceed to assess the income, profits and gains in case the income, profits or gains have escaped assessment. Secondly, he can reassess the income, profits or gains in case they have been under assessed. Thirdly, he can compute the loss or depreciation allowance, if excessive loss or depreciation allowance had been computed as

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the name of original assessment under section 23 of the Act. If under this provision, the only power, which the Legislature granted to the Income-tax Officer, had been the power to assess the income, profits and gains of an assessee which had escaped assessment, it would be true that there would have been no necessity for mentioning the fiction of law that the provisions of the Act would apply as if the notice issued under this provision of law, were a notice issued under sub-section (2) of section 22 of the Act. The Legislature having once laid down the procedure for assessment of income, profits or gains need only have laid down in section 24(1)(a) that the provisions of the Act shall so far as may be, apply accordingly. The mere use of this language would have been enough to attract the applicability of the provisions of section 23 to the proceedings for assessment, value under section 24(1)-(d) of the Act. Section 24(1)(e), however, covers proceedings of two other types viz. proceedings for re-assessment of income, profits or gains, and proceedings for re-computation of loss or depreciation allowance. A proceeding for re-computation of loss or depreciation allowance could also be held to be governed by the provisions of section 23 of the Act because computation or re-computation would only be an intermediate step in making the assessment. Re-assessment under section 24(1)(e) is however different from a proceeding for assessment. No doubt in a number of sections of the Act the words assess or assessments have been used so as to include in them, reassess or re-assessment, but at least in section 24(1)(e) of the Act, the word assess cannot be held to include reassess as both the words are used with a disjunctive "or" between them. Consequently so far as section 24(1)(e) of the Act is concerned, it makes a distinction between a proceeding for assessment and a proceeding for re-assessment and for the purpose of this section, therefore, it became necessary to lay down that the provisions of the Act, which apply to a proceeding for assessment, would also apply to a proceeding for re-assessment. This purpose was achieved by the Legislature by introducing the fiction of law that in a proceeding in pursuance of a notice served under section 24(1)(e) of the Act, the provisions of the Act

would apply as if the issue were a issue raised under subsection (2) of section 22 of the Act. The main thrust of this fiction of law was therefore necessary in order that a proceeding for reassessment under section 34(1) (a) of the Act may be governed by the procedure laid down in section 22 of the Act with the further result that an assessee whose case is being dealt with under section 34(1) (a) of the Act should have the benefit of the rights granted under sections 34, 35, 46 and 57 of the Act.

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Coming now to section 34(1) (A) of the Act it has first to be kept in view that this section follows sections 22, 23 and 34(1) (a) of the Act. These three sections between them, on the interpretation placed by me above, lay down the procedure which an Income tax Officer has to follow when he either assesses the income, profit or gain of an assessee or reassesses them. The procedure for both assessment and reassessment having been laid down in three sections which precede section 34(1) (A) of the Act it became unnecessary for the Legislature to introduce any further fiction of law so that it was sufficient to apply the provisions of the Act. It was for this reason that in section 34(1) (A) of the Act the Legislature merely laid down that the provisions of the Act except certain provisions mentioned therein shall apply accordingly. Then this clause is preceded by the word *thereupon*.

The use of this word indicates that the provisions of the Act would become applicable when, after the issue of a notice under section 34(1) (A) of the Act, the Income tax Officer proceeds to assess or reassess the income, profit or gain of the assessee. In section 34(1) (a) of the Act the Legislature had, after introducing the fiction of law, clearly indicated how the provisions of the Act were to apply even to a proceeding for reassessment though at times those provisions were applicable only to a proceeding for a *reassessment* and made no mention of a proceeding for *reassessment*. In section 34(1) (A) of the Act the Income tax Officer was again directed, after issue of a notice to proceed to assess or reassess the income, profit or gain of an assessee and

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when it was laid down that in such a proceeding by the Income-tax Officer, the provisions of the Act shall apply accordingly, it could only mean that the principles laid down in section 34 (1) of the Act would also apply and as a result of the application of those provisions the procedure laid down in section 23 of the Act would be applicable with the necessary consequence that the assesse would be entitled to the benefit of the provisions of sections 33, 35, 36 and 37 of the Act which rights accrue as a result of the application of section 23 of the Act. No doubt, the omission to introduce the fiction of law in section 34 (1 A) of the Act does not equate a notice issued under it with a notice issued under section 34 (1) (c) of the Act or with a notice issued under section 22 (2) of the Act, but there was no necessity of making a provision to that behalf, because what the Legislature was concerned with was only the procedure which was to be applied in a proceeding taken by an Income-tax Officer under section 34 (1 A) of the Act and not with the nature of the notice issued under it. The proceedings being proceedings for assessment or re-assessment, it was sufficient to say that, whereas the provision of this Act shall, so far as may be, apply accordingly, as the direction would attract the applicability of all the provisions of the Act which apply to a proceeding for assessment or re-assessment. Having laid down the procedure for assessment or re-assessment in sections 23 and 34 (1) of the Act these provisions were made applicable to proceedings under section 34 (1 A) of the Act by using the expression for which purpose the fiction of law of the type introduced in section 34 (1) of the Act was no longer required. This interpretation of the language of these relevant provisions of law thus leads to the conclusion that a proceeding for assessment or re-assessment of income, profits or gains by an Income-tax Officer even under section 34 (1 A) of the Act is governed in the matter of procedure and in the matter of appeals and reference to the High Court, by the same provisions which govern a proceeding for assessment or re-assessment of income, profits or gains under section 34 (1) of the Act. There is thus no difference in the matter of

protection of the rights of an assignee who may be proceeded against either under section 54(1)-(4) or under section 56(1)-(4) of the Act.

The interpretation sought to be put by learned counsel for the petitioner cannot, further be accepted for the reason that as that interpretation would 34(1 A) of the Act would leave the proceeding incomplete and would not achieve the purpose for which section 34(1 A) of the Act was introduced. If section 23 of the Act is held not to be applicable to a proceeding under section 34(1 A) of the Act, the provisions of the latter section will have to be applied by themselves. They only empower the Income tax Officer to proceed to assess or to assess the income, profits or gains of an assessee, but nowhere lay down that he has also to determine the sum payable in assessment by the assessee on the basis of such assessment or re-assessment. Under sub-section (3) and (6) of section 23 of the Act the Income tax Officer is not only empowered to assess the total income of an assessee, but also the sum payable by him on the basis of such assessment. Sub-section (4) of section 23 of the Act empowers the Income tax Officer to assess the total income of a firm and then lays down how the tax on the basis of the income of the firm is to be determined and by whom it is to be paid. In the case of a registered firm after the income, profits or gains of the firm have been assessed, the income tax payable by the firm is not determined and, taxed, the share in the income, profits or gains of the firm of each partner of the firm is included in his total income and on the basis of the total income of each partner as assessed the sum payable in income tax by each partner is determined. In the case of an unregistered firm, the Income tax Officer is given the option, instead of determining the sum payable by the firm itself to proceed to assess the total income of each partner of the firm including his share of its income, profits or gains and to determine the tax payable by each partner on the basis of such assessment or, in the alternative, to determine the sum payable by the firm itself. The determination of the income tax and the determination of the person by whom the tax is payable is thus laid down in

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section 23 of the Act and is a necessary provision for the purpose for which the Income Tax was enacted, viz. the charging of income to income tax for raising revenue for the Government. In case section 34(1 A) of the Act had been amended by the Legislature to be quite independent of section 23 of the Act, similar provisions for determining the sum payable as income tax, and the person who was liable to pay that sum would have been included in section 34(1 A) of the Act also. The main aim is to make provision for determination of the amount of tax and of the identity of the person who is liable to pay that amount can only be explained on the interpretation that the provisions of section 23 of the Act are applicable in a proceeding for assessment or reassessment of income, profits or gains of an assessee under section 34(1 A) of the Act. It is also to be noticed that, if the provisions of section 23 of the Act are not applied to an assesse who is not a registered firm. It is only under section 23(3) of the Act that after the income, profits or gains of a firm have been assessed, the Income-tax Officer is directed not to determine the tax payable by the firm until he is sure effect to the assessment of the income of the firm in the assessments of each partner and to determine the sum payable by each partner after including in his total income his share of the income, profits or gains of the firm which may have been assessed. A case may arise where the income may be a registered firm and usually its assessment may have been made under section 23(2) of the Act. When, possibly, it may become necessary to take proceedings for reassessment against the same registered firm under section 34(1 A) of the Act. If the provisions of section 23(1) of the Act are not applied to the reassessment under section 34(1 A) of the Act, the Income-tax Officer would not in such reassessment be entitled to include in the total income of each partner the share of that partner in the income of the firm so reassessed. He would be compelled in such a case either to stop at the stage of reassessment of the income, profits or gains of the firm and not determine the sum payable as, or in the alternative, he would have to determine the sum payable on the basis of the income of the firm reassessed.

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in respect of sub-sections (2) and (3) of section 34 unless the whole of section 34 would otherwise have been applicable to a proceeding under section 34(1 A) of the Act. The incorporation of this exception thus leads to the inference that section 34(1) of the Act has also been made applicable to section 34(1 A) of the Act and it was for this reason that the Legislature had to make a specific provision barring the applicability of clauses (a) and (a)(i) of the proviso to the sub-sections (2) and sub-sections (2) and (3) of section 34 of the Act as it was desired that these provisions should not be applicable. If section 34(1) applies, the necessary consequence of its application is that the proceedings for assessment or reassessment under section 34(1 A) are to be carried out in the same manner and are to be governed by the same provisions of the Act as proceedings under section 34(1) of the Act. Proceedings under section 34(1) of the Act are clearly governed by the provisions of sections 23, 30, 32 and 36 of the Act and, consequently, these provisions of the Act have also to be given effect to in proceedings under section 34(1 A) of the Act.

It also appears to me that on the correct principles of interpretation of statutes the interpretation, which I have indicated above, will be correct and justified rather than the interpretation sought to be put by learned counsel for the petitioner. One well recognised principle is that, though a sense of the possible injustice of an interpretation, ought not to induce Judges to do violence to well settled rules of construction, whenever the language of the Legislature shows, of one consistent sense, the courts act upon the view that the Legislature could not have intended to bring about obvious injustice, so that the courts should accept that possible interpretation which would lead to proper justice. In the present case, if I was to accept the interpretation sought to be put on section 34(1 A) of the Act on behalf of the petitioner, it would mean that the Legislature intended to do injustice to persons proceeded against under this provision of law, while it promoted justice only in cases of those persons who are proceeded against under section 34(1) of the Act. The interpretation put by me on the

provisions of section 34(1 A) of the Act would result in equal justice being done between all persons affected by this law and, consequently, that is the interpretation which should be accepted. Further a court should also be chary of accepting an interpretation that leads to the invalidity of a law. In fact there is presumption in favour of the constitutionality of a legislative enactment, as remarked by the Supreme Court in *Amr Patel Narayan Sahu v The State of Bihar* (1). The interpretative sense, that I have accepted above, leads to the consistent reading of section 34(1 A) of the Act without doing any violence to its language and therefore that interpretative sense must be held to be the correct one.

Learned counsel for the petitioner, in support of his contention that the provisions of section 34(1 A) of the Act were ultra vires Article 14 of the Constitution as it brought about discrimination in the matter of procedure applicable to assessment proceedings and right of appeal and reference to the High Court drew our attention to four cases decided by the Supreme Court. Those are *Sanyal Mill Motils & Co. v S. P. Farnsworth Sastri* (2), *Shree Moolasahai Mills Ltd., Madras v S. S. P. Farnsworth Sastri* (3) *A. Thangal Sanyal Moolasahai v. S. P. Farnsworth Sastri*, *Judicial Officer, and Farnsworth Officer (4)* and *M. C. T. Mathan v Commissioner of Farnsworth, Madras* (5). It does not appear to me to be necessary to examine these decisions in detail because the view I have taken is that the procedure for assessment laid down in section 21 of the Act is applicable to assessment or re-assessment both under sections 34(1) and section 34(1 A) of the Act. Further I have held that the benefit of the provisions contained in sections 31, 33, 46 and 57 of the Act are also equally available to persons proceeded against under either section 34(1) or section 34(1 A) of the Act. Reference may, however, be made to the decision in *Shree Moolasahai Mills Ltd., Madras v S. S. P. Farnsworth Sastri* (3), where their Lordships of the Supreme Court mentioned the validity of sub-section

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(1) of section 5 of the Taxation on Income (Income-tax Commission) Act, 1997, by comparing it with the provisions of section 54(1A) of the Act. Second question, which was raised before the Supreme Court in *Sirsi Marakolu Milk case*. (1) was—

Whether, after the coming into force of the Indian Income Tax (Amendment) Act, 1994, which operates on the same field as section 5(1) of Act XXX of 1947, the provisions of section 5(1) of Act XXX of 1947, assuming they were based on a rational classification, have not become void and unenforceable, as being discriminatory in character?

The Supreme Court took notice of the fact that the Parliament had, by amending section 54 of the Indian Income Tax Act, provided that cases of those very persons who originally fell within the ambit of section 5(1) of Act XXX of 1947 and who it was alleged formed a distinct class, can be dealt with under the amended section 54 and under the procedure provided in the Income Tax Act. The amendment in section 54 of which the Supreme Court took notice, was the introduction of section 54(1A) of the Act. Referring to the persons who could, after the introduction of section 54(1A), be dealt with either under section 54 of the Act or under section 5(1) of Act XXX of 1947, their Lordships remarked:

All these persons can now well ask the question, why are we now being dealt with by the discriminatory and drastic procedure of Act XXX of 1947 when those similarly situated as ourselves can be dealt with by the Income-tax Officer under the amended provisions of section 54 of the Act? Even if we take here a distinctive label, that distinction no longer remains and the label now borne by us is the same as it borne by persons who can be dealt with under section 54 of the Act as amended. In other words, there is nothing unakinous either in proportion or in characteristics between us and those students of income-tax who are to be dealt with by the Income-tax Officer under the provisions of

amended section 34. In our judgment, no satisfactory answer can be reversed to this query because the field on which amended section 34 operates *per se* excludes the set-up of summary which previously was occupied by section 5(1) of Act XXX of 1947 and two substantially different lines of procedure, one being more prejudicial to the assessee than the other, cannot be allowed to operate on the same field in view of the guarantee of Article 14 of the Constitution.

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In expressing this opinion, their Lordships of the Supreme Court had held that cases of persons proceeded against under section 5(1) of the Taxation of Income (Investigation Commission) Act, 1947, were not governed by the provisions of the Income Tax Act and had to be decided in accordance with the principles of natural justice. They had no right of appeal, nor could they claim the benefit of inspection and discovery provided by section 37 of the Act. Though their Lordships did not specifically go into the question of the applicability of sections 51, 55 and 57 of the Act to cases of persons proceeded against under the amended section 34, the decision of their Lordships proceeded on the basis that persons proceeded against under the amended section 34 did acquire the right of obtaining appellate decrees under sections 51 and 55 of the Act and could also claim the benefit of the substantial and valuable privileges conferred by section 37 of the Act. Implicitly, therefore, though not expressly, their Lordships of the Supreme Court held that if proceedings against an assessee are taken under section 34(1-A) of the Act, that assessee will have the right of going up in appeal to the Appellate Assistant Commissioner and the Income-tax Appellate Tribunal and will also have the privileges conferred by section 37 of the Act. It was only on the basis of the acceptance of this position that their Lordships came to the view that persons proceeded against under section 5(1) of the Taxation of Income (Investigation Commission) Act, 1947, were being dealt with by a discriminatory and drastic procedure as compared with persons who

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could be dealt with under section 34 of the Act, as amended. It would then appear that, in this case, their Lordships of the Supreme Court proceeded on an interpretation of section 34 (1 A) of the Act, which is the same as the interpretation which I have arrived at earlier in this case is that, to a certain extent, the interpretation put by me is supported by the views of the Supreme Court. The submission by learned counsel for the petitioner that section 34 (1 A) of the Act is ultra vires Article 14 of the Constitution on the ground that it was discriminatory as to the matter of procedure, right of appeal and benefit of section 37 of the Act as compared with section 34 (1) of the Act, therefore, fails.

The second aspect on which section 34 (1 A) of the Act was challenged is ultra vires Article 14 of the Constitution by learned counsel for the petitioner, was that, in the case of a person, proceeded against under the provision of law, there was no period of limitation prescribed whereas a period of limitation of eight years or four years was laid down in respect of persons against whom proceedings may be taken under section 34 (1) of the Act. It was urged that, since the two provisions of law could cover cases of persons similarly situated, this discrimination in the matter of limitation rendered section 34 (1 A) of the Act ultra vires Article 14 of the Constitution. It is to be noted that, even though there is a common class of persons who can be proceeded against under both section 34 (1) as well as section 34 (1 A) of the Act, the latter provision is applicable to a limited class of persons. That class of persons are those whose income, profits or gains had escaped assessment for any year in respect of which the relevant previous year fell wholly or partly within the period beginning on the 1st day of September, 1957 and ending on the 31st day of March, 1960. Then there was a second limitation that the income, profits or gains, which have so escaped assessment, was, as believed by the Income-tax Officer, to be likely to amount to one lakh of rupees or more. It seems to me that, having picked out such a narrow class, the Legislature made a special provision under section 34 (1 A) of the Act for taking proceedings against that

class of persons without being limited by any period of limitation and by, thus all that the Legislature did was to enlarge the period of limitation in these cases. Once it has been held that proceedings for assessment under section 34 (1) as well as under section 34 (1 A) of the Act in the nature of procedural right of appeal are, then and, section 34 (1 A) has to be read as an exception to section 34 (1) of the Act whereby the limitation applicable to the larger class of persons who could be dealt with under section 34 (1) of the Act has been done away with for a smaller class of persons. It is therefore in the nature of an exception specifically for the purpose of enlarging the period of limitation or doing away with the limitation in the case of a limited and narrower class. This narrower class is indicated by the language of section 34 (1 A) of the Act, consisted of persons who had earned income during the war period and who had evaded payment of tax on income of one lakh of rupees or more, and the purpose of introducing this provision was to subject their escaped income to tax. It is not possible to accept the contention that even such persons can legitimately claim that they should be allowed to escape payment of tax on ground of limitation like persons, who had not made war profits and whose escaped income did not amount to one lakh of rupees or more and who may escape after the expiry of the period of limitation of four years or eight years as the case may be. Removal of restriction of limitation in the case of such special class of evaders clearly has a nexus with the purpose for which this provision of law was introduced so that the determination brought about by section 34 (1 A) of the Act is not such as to render it void on the ground of violating the provision of Article 14 of the Constitution. In this connection learned counsel for the petitioners relied on the views expressed by three Justices of the Supreme Court in the case of *Surya Mohi Moite & Co. v. I.T. Commissioner Beroil* (3) where their Lordships pointed out that under the provisions of section 34 of the Income Tax Act investigation into escaped income of evaded income is limited by a maximum period of eight years while under the provisions of sub-section (5) of

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section 5 of the Act XXX of 1947, is not limited to any period and that currently operates to the detriment of those dealt with under subsection (6) of section 5 of the Act XXX of 1947 and those dealt with under section 34 of the Indian Income Tax Act. This view was expressed by the Supreme Court after giving a decision that the procedure applicable to persons proceeded against under subsection (6) of section 5 of Act XXX of 1947 was more drastic and discriminatory than the procedure applicable to persons dealt with under section 34 of the Indian Income Tax Act. If the procedure was different, the difference in the period of limitation would also be clearly discriminatory but if the procedure had been identical and the persons who could be dealt with under subsection (6) of section 5 of the Act XXX of 1947 had been a narrower class comprised within a bigger class which could be dealt with under section 34 of the Indian Income Tax Act, the position might have been different in this case and as in the present case, it might have been possible for these Lordships to hold that the provision of subsection (6) of section 5 of Act XXX of 1947 was in the nature of an exception for a smaller and limited class for which a larger period of limitation for taking proceedings had been provided. That not being the case, it must be held that their Lordships of the Supreme Court were dealing with discrimination in the matter of limitation under entirely different circumstances, so that the decision of their Lordships in that case cannot be applied to the present case. The principle, on which limitation has been done away with in respect of the class of persons who can be proceeded against under section 34(1A) of the Act, is very similar to the principle on which discrimination in the matter of limitation already exists in the Income Tax Act between the classes of persons proceeded against under section 34(1)(a) and section 34(1)(b) of the Act. Section 34(1)(b) of the Act deals with cases of persons whose names have escaped assessment for any reason whatsoever without any reference to any act committed by those persons. Section 34(1)(a) of the Act deals with the case of persons whose names may have escaped assessment as a result of some act or omission on their part,

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has to be made on all relevant material and on evidence and the assessor ordinarily has the fullest right to inspect the records and all documents and materials that are to be used against him. Under the provisions of section 37 of the Indian Income Tax Act the proceedings before the Income tax Officer are judicial proceedings and all the maxims of such judicial proceedings have to be observed before the result is arrived at.

In the last sentence, quoted above, their Lordships held that proceedings before the Income tax Officer are judicial proceedings. The reference was to proceedings for assessment on escaped or evaded income under the provisions of section 34 of the Indian Income Tax Act and not as intended by learned counsel for the Department as proceedings under section 37 of the Indian Income Tax Act. Reference to section 37 of the Indian Income Tax Act was made by their Lordships for the purpose of deciding what was the nature of the proceedings before the Income tax Officer when making an assessment on escaped or evaded income under the provisions of section 34 of the Act. Relying on this decision of the Supreme Court, learned counsel for the petitioners urged that, in the present case, the Income tax Officer who was taking proceedings under section 34(1 A) of the Act, was dealing with judicial proceedings and, further, that he was a person with a bias inasmuch as he was an officer appointed by the Government to collect revenues and is, under the provisions of the Act, liable to be treated as a quack when the order of assessment is taken up in appeal to the Appellate Authority. Counsel for the Income tax Appellate Tribunal. It was urged that, on the principle laid down by the Supreme Court in *Gulabpali Nagawara Rao v. Andhra Pradesh State Road Transport Corporation* (1), it was against the principles of natural justice for the Income tax Officer to be treated with discretion in judicial proceedings and his decisions are, therefore, voidable. In the case of *Gulabpali Nagawara Rao v. Andhra Pradesh State Road Transport Corporation* (1), their Lordships were dealing

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person who may finally decide the case. On this ground, it was held that the proceedings and hearing given in violation of that principle were bad. The proceedings for hearing of the objections were held to be quasi-judicial proceedings. It was urged by learned counsel for the petitioners before us that, applying the same principle to the instant case, we should hold that the Income tax Officer, who was a person with a bias, was not competent to pass orders of assessment or reassessment under section 24 (1 A) of the Act and the proceedings before him were bad as they violated the principles of natural justice, mentioned above. Learned counsel for the Department, in reply, contended that the Income tax Officer could not be held to be a person having a bias or an interest in the proceedings when he was only carrying out his statutory duties of making an assessment or reassessment in accordance with the provisions of the Act. There is, however, the fact that when an order is passed by the Income tax Officer and it is taken up on first appeal to the Appellate Assistant Commissioner or on second appeal to the Income tax Appellate Tribunal the Income tax Officer who passed the order for assessment or reassessment, is treated as a party to the appeal. In these circumstances the question that the Income tax Officer is a person with a bias or not is not free from doubt but, it appears to me that it is not necessary in this case to express any final opinion on this point because, even if it be held that the Income tax Officer is a person with a bias, I am not prepared to accept the submission of learned counsel for the petitioners that orders of assessment or reassessment passed by him would be voided. The case of *Guthajali Jagannath Rao v. Andhra Pradesh State Road Transport Corporation* (1) which came up before the Supreme Court, was one where there was only one right of hearing under the law and, under the rules and orders made by the Government of Andhra Pradesh that hearing was afforded by the Secretary of the Transport Department who was held to be a person with a bias. There was no further appeal or any further hearing before any other independent authority or tribunal. In the Income

Tax Act, the position is different. Whenever an order of assessment or re assessment is made by an Income tax Officer it is subject to an appeal before the Appellate Assistant Commissioner and to a further appeal before the Income tax Appellate Tribunal. There can be a valid scheme where the making of an order is because of the circumstances in which that order is to be made, may be exercised to a person who has a bias, but the right of hearing before an independent authority may be granted by making a provision for appeal to an independent authority. In such a case, the aggrieved person would get a hearing before an independent authority whose decision would be final and, if such a provision exists it cannot be said that any principle of natural justice are violated. It appears to me that the essential feature of the principles of natural justice is that no person should be deprived of any right by a process or quasi-judicial order unless he has had a hearing before an independent authority who is not interested in the proceeding or in any party to the proceeding. Under the Income Tax Act, this principle is complied with by permitting appeals before the Appellate Assistant Commissioner and the Income tax Appellate Tribunal.

There is the further aspect that the principle of natural justice which was applied by their Lordships in the Supreme Court in the case of *Goldapple Muggernut, Inc. v. American Petroleum State Transport Corporation* (1), was in that case applied to rules issued by the State Government or to the executive orders passed by the State Government. The Legislative enactment had only provided for hearing being given by the State Government without laying down that the hearing was to be by the Secretary, Exchange of the State Transport Department. The rules and orders, under which the Secretary of the State Transport Department was authorized to give a hearing were declared void by the Supreme Court on the ground that the procedure violated the principle of natural justice mentioned above.

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The same consideration does not apply when the principle of natural justice is done away with by a specific provision having been made in a statute by the Legislature. This was held by their Lordships of the Supreme Court in *A. K. Gopalan v. The State of Madras* (1) where their Lordships' decision was expressed in the following words:

There is considerable authority for the view that the courts are not at liberty to declare an Act void because in their opinion it is opposed to a spirit supposed to pervade the Constitution but not expressed in words. Where the fundamental law has not limited, either in terms or by necessary implication, the general powers conferred upon the Legislature, we cannot declare a limitation under the notion of having discovered something in the spirit of the Constitution, which is not even mentioned in the instrument. It is difficult upon any general principle to limit the omnipotence of the sovereign legislative power by judicial usurpation, except so far as the express words of a written constitution give that authority. It is also clear, if the words be positive and without ambiguity, there is no authority for a court to strike or repeal a statute on that ground alone. But it is only in express constitutional provisions limiting legislative power and controlling the temporary will of a majority by a permanent and permanent law vested by the deliberate wisdom of the nation that one can find a safe and solid ground for the authority of courts of justice to declare void any legislative enactment. Any assumption of authority beyond this would be to place in the hands of the judiciary powers too great and too indefinite either for its own account or the protection of private rights.

The principle was even more clearly expressed by a Division Bench of this Court in *Ch. Mohd. Saifi v. the State of U. P.* (2). In that case, the principles of

(1) A. I. R. 1950 S. 1, 27. (2) 1954 A. I. J. 201.

natural justice, which held to be well settled, were equated to being four in number, viz:

(1) That every person whose civil rights are affected must have a reasonable notice of the case he has to meet.

(2) That he must have reasonable opportunity of being heard in his defence.

(3) That the hearing must be by an impartial tribunal i.e. a person who is neither directly nor indirectly a party to the case, or who has an interest in the litigation, or is already biased against the party concerned.

(4) That the authority must act in good faith, and not arbitrarily but reasonably.

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The learned Judge then proceeded to lay down in which cases these principles of natural justice can be invoked under the Indian law and held that they can be invoked in the following three classes of cases:

(a) When it is alleged that a certain person or class of persons have been unreasonably discriminated against; and that the law violates the provisions of Art. 14; or that the restrictions imposed upon the freedoms guaranteed under Art. 12 are unreasonable.

(b) When a rule or regulation or order made in the exercise of a statutory power is attacked on the ground that it is unreasonable, and

(c) When the procedure adopted by a judicial or quasi-judicial authority not being one prescribed by law is challenged on the ground that it is unfair and unjust.

Proceeding further, it was held that under the Indian Constitution, except as provided in Art. 14 of the Constitution, there is no general limitation on the power of the Legislature that it will not enact a law contrary to the principles of natural justice. If a certain procedure is prescribed by law, then unless it contravenes the provisions of Article 14, it cannot be challenged as void on any supposed principles of natural justice. In

On this subject, it departs from the American Constitution under which the Union and the State Legislatures are forbidden to enact laws affecting the life, liberty or property of individuals except in accordance with the due process of law. Due process of law includes principles of natural justice. The doctrine of due process has not been adopted by the Indian Constitution, see in recent cases where its principles have been expressly rejected in the Constitution. In the instant case the Income-tax Officer has been entrusted with the power of passing orders of assessment or discontinuance by the Act itself which was enacted by the Legislature and consequently, principles of natural justice cannot be invoked for the purpose of holding that such a provision is void. It was not urged at any stage before us that in entrusting this work to the Income-tax Officer, the Legislature had violated any express provision of the Constitution. This is, in my opinion, the principal ground on which this submission made by learned counsel for the petitioner must be rejected.

Out of the remaining points which were raised in this petition, only one other point was mentioned by learned counsel for the petitioner before us. That point is raised in Ground no. 3(i) of the writ petition and it is to the effect that proceedings for assessment or discontinuance under section 24(1) A) of the Act are taken on subjective satisfaction of the Central Board of Revenue or the Income-tax Officer without any requirement of disclosure of the grounds of such satisfaction and without any right of prior representation before the satisfaction is recorded. Reliance was placed on a decision of the Supreme Court in *Rajshuber Singh v. Court of Wards, Ajmer* (1), I do not think that the doctrine in that case is applicable to the present case. In that case, certain powers of the Court of Wards Act were challenged on the ground that there was deprivation of possession of certain property on the subjective satisfaction of the authority mentioned therein. That no doubt violated the principle laid down in Article 14 of the Constitution. In the instant case, the subjective

satisfaction is only for the purpose of causing proceedings under section 34 (1 A) of the Act and all that can be done as a result of that subjective satisfaction is to take proceedings for attachment or to arrest, when the matter is given all the rights which he can claim as a party to a judicial or quasi-judicial proceeding. It is not possible to accept that the provisions of Article 34 or 39 of the Constitution can apply at the initial stage when proceedings have to be started on the subjective satisfaction of the authority empowered to initiate the proceedings. Consequently, this ground has no force at all.

The facts and figures in the connected *Writ Petition* no. 469 of 1955 are slightly different from the facts and figures in *Writ Petition* no. 397 of 1955 but it was considered by learned counsel for the petitioner that the question relating to the violation of section 34 (1 A) of the Act and the proceedings taken thereunder which arise in *Writ Petition* no. 469 of 1955 are identical with those which arise in *Writ Petition* no. 397 of 1955. Consequently, it is not necessary for me to give the facts and figures relating to *Writ Petition* no. 469 of 1955 and my decision on the basis of facts and circumstances in *Writ Petition* no. 397 of 1955 will fully apply to *Writ Petition* no. 469 of 1955.

As a result of my view on the various points that were canvassed before the Full Bench I have come to the conclusion that there is no force in these writ petitions and they are therefore dismissed with costs which will include Rs 100 in each writ petition as fee at least and counsel for the Department.

CHANDRASEKHAR, J.—The above petitions were heard by a Division Bench which referred them for disposal by a larger Bench of three Judges. I have had the benefit of reading the judgments of Mr. Justice V. BHASKARAN, with whose conclusions I agree. The learned Judge has dealt in detail with all the points canvassed before the Full Bench. I consequently propose to deal with only the more important ones and to give reasons for arriving at the conclusions.

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The petitioner in Writ Case no. 489 of 1954 are the son and widow of late Sri J. P. Srivastava, and in Writ Case no. 387 of 1955 only the son is the petitioner. In giving the facts of the case, which in all material particulars are the same, I shall refer to the facts of Writ Case no. 387 of 1955.

The petitioner had been duly assessed to income tax for the assessment years 1948-49 to 1948-49. On or about the 17th May, 1948, he received notice from the Secretary, Income-tax Investigation Commission, informing the petitioner that his case had been referred to the Income-tax Investigation Commission under section 2(1) of the Taxation on Income (Investigation Commission) Act, 1947 (hereinafter called the Investigation Commission Act). The petitioner was required to furnish to the Investigation Commission certain information and to comply with the requirements contained in the notice. The petitioner supplied some information and also carried out some of the directions as required by the notice. Before however the Investigation Commission could deal with the case of the petitioner the Commission was wound up as a result of certain decisions of the Supreme Court of India, referred to which will be presently made. On the 21st December 1954, the petitioner received seven notices from the Income-tax Officer purporting to be under section 2(1)(A) of Indian Income Tax Act. By these notices the petitioner was required to submit returns of his total income assessable for each of the assessment years 1948-49 to 1948-49. On the 29th January 1955, the petitioner asked for two months' time but the Income-tax Officer allowed him only one month. A request for one month was again made but it was refused by means of a letter dated the 1st March 1955, of the Income-tax Officer (respondent no. 2) to whom the case had been transferred as the respondent. The respondent no. 2 allowed time to the petitioner up to the 21st March 1955 for filing the returns. The petitioner then warned the Income-tax Officer to supply him with the reasons for the issue of the notices, but the reasons were not supplied. The petitioner then filed his returns under

present on the 31st March, 1955. The present petition was then moved with the prayer that a writ of mandamus be issued to both the Income-tax Officers (respondents nos. 1 and 2) directing them to recall the notices and to forbear from proceeding under or in pursuance of the notices.

The main ground taken in the writ petition is that section 34(1 A) of the Indian Income Tax Act is a good piece of legislation inasmuch as it is consistent with Article 14 of the Constitution. The respondent pointed out in that the same class of persons who can be proceeded against under section 34(1) can also be proceeded against under section 34(1 A), but the persons proceeded against under section 34(1 A) are denied equality before the law because they are deprived of the right of filing appeals and revisions against the assessment order and also deprived of an opportunity of having their cases referred to the High Court under section 46 of the Income Tax Act.

If the above were the true position it would be obvious that section 34(1 A) would be inconsistent with Article 14 of the Constitution. But I think that that is not really the case. In order to appreciate the contents of Mr. R. S. Puri's learned counsel for the petitioner who has argued the case with ability and skill it is necessary to make a reference to some provisions of the Investigation Commission Act and of the Indian Income Tax Act as also the reasons for the enactment of section 34(1 A).

The Investigation Commission Act, Act no. XXX of 1947 came into force on the 18th April, 1947. Section 3 of the Act authorised the Central Government to constitute a Commission called Income tax Investigation Commission, and section 4 provided for the composition of the Commission. Section 5 of the Act as subsequently amended contained four sub-sections. The first sub-section authorised the Central Government to refer to the Commission any case or point in a case in which the Central Government had prima facie reasons for believing that a person had, to a substantial extent, evaded

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The provisions of the Investigation Commission Act were read more closely and the result of the discussion led to the conclusion that the same class of persons similarly situated could be dealt with by the various provisions of the Investigation Commission Act as section 34 (1) of the Income Tax Act at the will of the Investigation Commission and the Central Government. Consequently section 3 (4) of the Investigation Commission Act was held to be inconsistent with Article 14 of the Constitution. This decision was given on the 26th May, 1954, and the Central Legislature soon after amended subsections (1 A), (1 B), (1 C) and (1 D) in section 34 of the Income Tax Act. These subsections came into force with effect from the 15th July, 1954.

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In the meantime, Sri Mammala Mills Ltd had filed petitions in the Supreme Court under Article 32 of the Constitution, and, on the above subsections having been introduced, the Mills prayed for and obtained permission to amend the petition by challenging the constitutionality of subsection (1) of section 3 of the Investigation Commission Act on the additional ground that subsection (1) of section 3 and the added subsections in section 34 of the Income Tax Act dealt with the same class of persons, and consequently section 3 (1) of the Investigation Commission Act had become inconsistent with Article 14 of the Constitution. Their Lordships decided the writ petition on the 21st October, 1954, and that decision is reported in the case of *Sri Mammala Mills Ltd v Sri Pannambet Sanku* (1). The learned Judges held that the procedure prescribed by the Investigation Commission Act was of a summary and drastic nature and constituted departure from the ordinary law of procedure and as important agency it was detrimental to the persons subjected to it. The main points of difference in the normal procedure provided by the Income Tax Act and the Investigation Commission Act had been dealt with in *Sri Mammala Mills Ltd* (2) case and, therefore, did not require further discussion. It was held that the persons dealt with under the Investigation Commission Act could complain that they were being

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dealt with under a more drastic and discriminatory procedure, when others similarly situated, could be dealt with by the Income-tax Officer under the amended provisions of section 34 of the Income Tax Act. This complaint was held to be justified and section 3(1) of the Investigation Commission Act was also held to be inconsistent with Article 14 of the Constitution.

The result of these decisions was that the General Commission could not refer to the Investigation Commission any fresh cases even at the instance of the Income-tax Commission. But still some cases were pending before the Investigation Commission, and in the case of *M. C. T. Mathai v. Commissioner of Income-tax, Madras* (2) it was further laid down that the Investigation Commission had no jurisdiction to complete the investigation of pending cases because the whole procedure adopted by the Commission was violative of the fundamental rights guaranteed in the interest under Article 14 of the Constitution. But the assessments which had become final before the 17th July 1954 were held to be valid and binding. This decision led to the winding up of the Investigation Commission finally.

A similar Investigation Commission had been set up in Travancore and similar questions of the validity of the Act constituting the Commission were raised and decided by the Supreme Court in the case of *A. Thangal Kunju Musaliar v. Pudukkottaiam Peto* (3). The only point to be noted in this decision is that the class of persons falling under section 3(1) of the Travancore Act, which corresponded to section 3(1) of the Investigation Commission Act, was not the same class of persons as fell within section 12(1) of the other Travancore Act, which mainly corresponded to section 34(1) of the Indian Income Tax Act.

After narrating the above history of the legislation, I may now come to the relevant portions of the impugned sub-section, namely, section 34 (1-A) of the Indian Income Tax Act. This sub-section provides that if the Income-tax Officer has reasons to believe that income

profit or gain chargeable to income tax, have escaped assessment for any year in respect of which the relevant previous year falls within the period beginning on the 1st day of September 1936 and ending on the 31st March 1940 and that such unassessable profits or gains are likely to amount one fifth of profits or more, the Income Tax Officer may notwithstanding that the period of limitation provided in clauses (4) and (5) of subsection (1) of section 34 has expired, serve on the assessee

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a notice concerning all or any of the requirements which may be included in a notice under subsection (2) of section 32 and may proceed to assess or reassess the income, profits or gains of the assessee for all or any of the years referred to in clause (5), and thereupon the provisions of the Act excepting those contained in clauses (i) and (ii) of the proviso to subsection (1) and in subsections (2) and (3) of this section shall so far as may be, apply accordingly.

The contention of the learned counsel for the petitioner is that a reading of the portions of section 34 (1 A) quoted above, shows that the assessment or reassessment for the years in question is to be made under the above subsection and not under section 23 of the Income Tax Act. After such assessment has been made under the unquoted subsections the provisions of the Income Tax Act are to apply so far as they are applicable. The word thereupon is given the meaning of thereafter and also giving this meaning it is argued that the assessment of income tax is to be under this subsection and not under section 23 with the consequence that the order of assessment passed under subsection (1 A) would not be appealable under section 30 and not being appealable under section 30 no second appeal would lie to the Appellate Income Tax Tribunal under section 33. Further, no reference would be permissible to the High Court under section 66 of the Income Tax Act. The argument is that the class of persons covered by section 34 (1) and that covered by section 34 (1 A) is the same and a person, who is dealt with under the latter subsection, has all the same remedies of appeal, revision and

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reference turned to him, which are available to the person dealt with under section 34. (1) of the Income Tax Act. All these serious consequences are said to follow from the fact that the assessments which are made under sub-section (1 A) will not be assessments under section 23.

I do not find it possible to accept the contention of the learned counsel for the petitioner. I think the unengaged sub-section does not provide for determination of sharing tax at all. In express words it only provides for assessment or re-assessment of the income, profits or gains. Assessment of income is different from the determination or assessment of income tax on that income, profits or gains. Under the unengaged sub-section the Income tax Officer is to assess or re-assess the income, profits or gains and there he has to stop. The subsequent system is power upon him to determine the amount of tax. For that determination the Income tax Officer will have to go to section 23 of the Income Tax Act. Sub-section (1) of that section requires the Income tax Officer to first assess the total income of the assessee and then to determine the sum payable by him. Determination of tax follows the assessment of income. The same is the position with respect to sub-section (3). Sub-section (4), which provides for what is called best judgment or assessment again says that the Income tax Officer—

shall make the assessment to the best of his judgment and determine the sum payable by the assessee on the basis of such assessment.

Under sub-section (3) the total income of the firm is assessed and in the case of an unengaged firm the income tax payable by the firm could not be determined. It will thus appear that section 23 makes a clear distinction between assessment of income and determination of tax. The unengaged sub-section (1 A) authorizes the Income tax Officer only to assess or re-assess the income, profits or gains of the assessee and confers no power on that officer to determine the tax. For determination of tax the Income tax Officer will have to go to section 23. It consequently follows that even where preferred steps have been started by a notice under sub-section

(1A) of section 28 and no assessment of the income has been made thereunder the determination of the tax will fall under the provisions of section 23 with the consequence that on appeal, a second appeal, and a reference will all be possible.

The learned counsel for the petitioner says that the word *income* as used in the Indian Income Tax Act sometimes refers to the assessment of income; sometimes to the assessment of profits and as others to the process of assessment. This certainly is correct, but in the impugned subsection the word *income* does not stand by itself and refers expressly to the assessment of income. The learned counsel referred to the dictionary meanings of the words *divergence*, *apply*, *prevail* and accordingly.

The words have been assigned more than one meaning in the dictionary, but none of the meanings assigned in the words exclude the interpretation of the impugned subsection that the Income-tax Officer is to assess the income and then the other provisions of the Income Tax Act become immediately applicable including the provisions of section 23.

In Ronald Barron Vol V at page 344 reference has been made to an old English case in which Colman, J. said that the word in the relevant provision meant, in consequence of the preceding thing being done. Shorter Oxford English Dictionary mentions a number of meanings of this word at page 2168 of Vol II and one of the meanings of the word there upon is on this subject or matter with reference to that. In Stroud's Judicial Dictionary the word

divergence has also been assigned the meaning as being equivalent to immediately. I think the word *divergence* as used in the impugned subsection has the meaning of on this subject or matter. But saying that the word means *divergence* the consequence is the same because the impugned subsection only provides for assessment of income, and on this assessment having been made what immediately has to be done is the determination of the income tax and for that the Income-tax Officer will derive his authority from section 23 of the Act.

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Coming to the significance of the word, apply one of the meanings given to it by the Shorter Oxford English Dictionary is to put into practical operation. The other meaning on which Mr. Potholke relies is to bring it into contact with facts. I think the first meaning is the more appropriate one. But even the second meaning relied upon by Mr. Potholke does not show the position.

The word *provisions* means each of the clauses or divisions of a legal or formal statement or such statement itself, or a class of such statement which makes express regulations or conditions. Here again the first meaning has to be applied to the word *provisions*, and the meaning does not in any way help the petitioner.

The word *accordingly* is said to mean harmoniously, properly suitably, correspondingly or in accordance with legal provisions. In Stroud's Judicial Dictionary it is said to mean agreeably or correspondingly. Mr. R. S. Potholke's argument is that the word *accordingly* means correspondingly and that the impugned sub-section corresponds to section 22 as the matter of determination of tax. I find myself unable to accept his argument. The word *accordingly* here means suitably, properly or harmoniously.

All the four words concerning the meaning of which controversy was raised before us are capable of bearing the meanings which are consistent with the intention of the legislature. In holding that the impugned sub-section contains the power of determination of tax in itself and that determination of tax does not fall under section 22, I think, the court will have to stretch the meaning of the words in favour of the petitioner in order to invalidate the legislation. The rule of construction, on the other hand, is that there is a strong presumption that a statute is in accordance with the Constitution and that in cases of ambiguity meaning should be attached to it which would make it constitutional. I think, there is no real ambiguity in the wordings of the impugned sub-section and the wordings clearly point to the conclusion that the determination of tax is not to be done

under that sub-section, and to this matter as well as others the provisions of the Indian Income Tax Act are to apply so far as they may suitably be applied. In order to determine the tax the Income-tax Officer will have to go to section 23 and the determination of the tax, therefore, will be under that section. Orders determining tax under section 23 are appealable under section 25 and a second appeal lies under section 27.

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The circumstances, which led to the introduction of the impugned sub-section in section 24 of the Indian Income Tax Act, necessarily point to the conclusion that the Legislature must have tried to remove the defect for which section 2(1) of the Investigation Commission Act had been held to be inconsistent with Article 16 of the Constitution by the highest Court in the country. The main reason for amending section 2(1) was that the order determining tax in pursuance of section 2(7) was final and not open to a first appeal, second appeal or a reference to the High Court. The impugned sub-section was enacted after the above decision and it is not possible to contemplate that the Legislature would in spite of the previous decision of the Supreme Court again incorporate the main objection in the subsequent legislation. The intention of the Legislature, more especially to remove the defects which had vitiating effect on section 2(1) of the Investigation Commission Act. This intention, I think, can be clearly gathered from the language of the impugned sub-section.

Mr. Pichai, referred to the cases of *Smt. Wita Devi v. District Board, Bhojpur* (1) and *Maheshaya Bysak v. Shree Sunder Mulder* (2). In the first case it was held that it was the duty of the court to try and harmonise the various provisions of an Act passed by the Legislature, but that it was usually not its duty to stretch the words used by the Legislature to fill in gaps or omissions in the provisions of the Act. In the second case it was held that if there was some defect in the phraseology used by the Legislature, the court could

(1) A. I. R. 1932 B. C. 302.

(2) A. I. R. 1931 B. C. 100.

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was noted the Legislature's defective phrasing of an Act or add or amend or by construction make up deficiencies which were left to the Act. From what I have stated above I think I am not doing anything in interpreting the engaged subsection which has been provided in the case cited above.

On the other hand, the cases of *Freight Insurance Co. Ltd. v. State of Bihar* (1) and *Gebhardt Das Pandurang Das v. Eastern Cotton Company* (2) are authorities for the proposition that there is a presumption of the court's necessity of an enactment. In the book *Interpretation of Statutes* by Maxwell there are passages on pages 254, 255, 256 and 257 of the 9th edition, conferring wide powers on the court in the matter of interpretation of statutes. But in interpreting the present statute it does not appear to be necessary to call in aid any of these powers.

In conclusion it may be said that section 34(1) of the Income Tax Act is to be applied generally to persons whose income has escaped assessment and subsection (1A) is to apply to the particular class of tax evaders who had made profits exceeding a lac of rupees during the war period. This is a definite class of persons against whom no proceedings could be taken under section 34(1) on the date the engaged section came into force namely the 15th July 1954. The period provided for under section 34(1) (a) was 5 years and 7 years had expired before the engaged subsection came into operation. The profits of only one year could be assessed both under section 34(1) and section 34(1A). But it is obvious that where escaped income of the whole or major portion of the war period was to be reassessed recovery would be had in the engaged section which on its language and workings was meant to cover cases of the evasion of taxes during the war period. Even for that one year, concerning which matters could have been assessed under both the sub-sections, the Income tax Officer could proceed only under sub-section (1A) if he was proceeding to assess the income for any subsequent

(1) 1953 25 C.M. 201.

(2) A.I.R. 1955 C. 111.

nal portion of the war period. There is thus a class taxation which was a reasonable one and closely related to the object of the legislation.

Further, assuming that one business man was proceeded against under section 34(1 A) and another, similarly situated, was proceeded against under section 34(1) it would really make no difference because all the material provisions of the Indian Income Tax Act would apply to both the persons. The provisions of the unquoted sub-section are in no way more stringent or harsh than the provisions of section 34(1). No question of direct taxation thus arises at all.

I may now briefly refer to the second point urged by the learned counsel for the petitioner though he did so with some hesitancy. The point is that the Income-tax Officers are persons with a bias against the business and they have thus no jurisdiction to assess income or to determine tax thereon. In support of the point, the learned counsel referred only to a recent decision of the Supreme Court reported in the case of *Gulabpalli Nagamma Rao v Andhra Pradesh State Roadways Transport Corporation* (1). The above case arose out of proceedings taken under the Indian Motor Vehicles Act. There was also a local Act known as Andhra Pradesh Road Transport Corporation Act. The Act provided for the procedure for approval of a scheme for running the State Transport service. The State Transport undertaking was authorised to prepare a scheme providing for Road Transport service to the residents, employers or partial or other persons. Any persons affected by the scheme could file objections before the Secretary to Government in charge of Transport Department. The Government then fixed a date for hearing objections and then the objections were to be considered and the scheme modified, as approved. The objections in this case were filed and they were considered by the Secretary to Government in charge of the Transport Department. He submitted a report to the Minister in charge and the Minister then approved the scheme. The learned Judge held by a majority that

(1) A. I. R. 1955 B. C. 381.

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the proceedings were of a quasi-judicial nature and the Secretary to Government had acted as a judge in his own case. His decision was therefore void. I think that the facts of the Supreme Court case are clearly different from the facts of the case before us. There was a Road Transport Corporation in the State of Andhra Pradesh and the Secretary of the Transport Department was in charge of it. It was open to him to decide objections of the persons who were affected by the scheme prepared by the Corporation. The objections formed one party and the Road Transport Corporation the other. The Secretary in charge of the Department was also governmentally responsible for the working of the Road Transport Corporation. Under the circumstances, he was also an interested person. The position in the case before us is very different. It cannot be said that the Income-tax Officers are one party to the assessment and the assessee the other. On the other hand the parties are the Central Government and the assessee. The Income-tax Officer is to perform quasi-judicial acts and make enquiry as to the correct income for the year in question. He is expected to act impartially between the Central Government and the assessee and thus arrive at a decision as regards the assessable income. It is not in his interest personally or in his official capacity to improperly assess people to tax even though the tax is not due. He has neither to over-assess the people nor under-assess them. He is not expected to make assessments not authorised by the statute.

The suggestion of the learned counsel for the petitioner is that every Income-tax officer takes to show revenues by way of income tax in order to show efficiency in his work. He is thus personally interested against the assessee. I do not think any such presumption is permissible. The Income-tax Officers are expected to perform their duties without fear or favour and to recover taxes only where they are legally due. The result of accepting the contention of the learned counsel would be that the work of the Income-tax Officer would

have to be done by officers belonging to the other departments and when those officers have been disposed of that work, it might again be argued that those officers had organized a similar strike. I do not think that the document relied upon by the learned counsel has any application to the facts of these cases.

For the reasons given above, I would dissent, the way persons with cars, which will include 80,000 in each area, person as for all leaves count for the department.

Urutera, J. —These two persons under Article 235 of the Constitution may, the question is, whether section 34 (1-4) of the Indian Income Tax Act is valid as offending against Article 31 of the Constitution.

The petitioners pray for the issue of appropriate writs to quash the notices issued under that section. Though several grounds were raised in the petition, I have confined for the petitioners without going up the other grounds, pointed in the memo for our consideration two grounds for challenging the notices and proceedings under section 54(1 A) of the Income Tax Act—(1) That section 54 (1 A) of the Act offended Article 14 of the Constitution as it denied equality before the law and provided a discriminatory procedure which could be followed by the Income tax Officer in the case of persons selected by him for such treatment and (2) that the proceedings being of a judicial or quasi-judicial nature, the Income tax Officer who was an interested party could not be validly empowered to take action and decide such

I have had the advantage of reading the opinions expressed by my learned brethren, Boscawen and Chalmers. If I agree with their decisions relating to the second ground mentioned above, I step; I am unable to agree with their views on the first ground.

The facts of the case have been set out by my brother BEAUMONT, J., and I do not think it necessary to repeat them. He has also set out in his judgment the development of the law relating to the payment of section 54 of the Income Tax Act which again need not be reiterated.

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Section 34 (2) provides for the assessment of income profits and gains chargeable to income tax that have escaped assessment over any year or have been under assessed or assessed at too low a rate or have been made the subject of income relief under the Act or excessive loss or depreciation or allowance has been computed, and dealing with cases and no claim on certain grounds enumerated in that section, prescribes certain periods of limitation during which notices may be issued by the Income-tax Officer to the person concerned and further lays down that a notice so to be issued should be one containing all or any of the requirements which may be in a notice under sub-section (2) of section 32 and that the Income-tax Officer may proceed to assess or reassess income profits or gains or to compute the loss or depreciation allowance and the provisions of the Act shall so far as may be apply accordingly as if the notice were a notice issued under that sub-section [viz., section 32 (2) of the Act].

Section 34 (1A) which was introduced by the Indian Income Tax (Amendment) Act, 1954 with effect from the 17 July, 1954, provides as follows:

34(1A) If in the case of any assessee the Income-tax Officer has reason to believe—

(a) that income profits or gains chargeable to income tax have escaped assessment for any year in respect of which the relevant previous year falls wholly or partly within the period beginning on the 1st day of September, 1954, and ending on the 31st day of March, 1955; and

(a) that the income profits or gains which have so escaped assessment for any such year or years amount or are likely to amount, to one lakh of rupees or more;

he may notwithstanding that the period of eight years or, as the case may be, four years specified in sub-section (1) has expired, on receipt thereof, serve on the assessee, or, if the assessee is a company, on the principal officer thereof, a notice containing all or any of the requirements which may be included in a notice under sub-section (2) of

section 17 and may proceed to deem or to assess the income payable to any of the persons for all or any of the years referred to in clause (a) and thereupon the provisions of this Act (including those contained in clause (i) and (ii) of the proviso to sub-section (1) and in sub-sections (2) and (3) of that section) shall so far as may be applicable, accordingly.

Provided that: the taxpayer. Officer shall not issue a notice under this sub-section unless he has recorded his reasons for doing so: and the Central Board of Revenue is satisfied on such reasons issued that it is in the interest for the issue of such notice.

Provided further, that no such notice shall be issued when the 11st day of March, 1856.

In order to proceed under the provisions of the Statute the Income tax Officer should have reason to believe (a) that income profits or gains chargeable to assessment, that have escaped assessment, were partly or wholly of the periods falling between the 1st September, 1938, and the 31st March, 1940; and (b) that they amounted to one lakh of rupees or more. If the Officer has reason to believe these two things the period of eight years and four years mentioned in sections 34 (1) are not to be applicable and the Income tax Officer may issue a notice concerning all or any of the requirements of a notice under section 22 (2) and the provisions of this Act, excepting those contained in clauses 1 and 2 of the proviso to subsection (1) and in subsections (2) and (3) of the proviso shall so far as may be apply accordingly. The words "as if the notice were a notice issued under that subsection", which occur in section 34 (1), do not find place in the new provision. Mr. Parikh, learned counsel for the petitioners, contended that this omission was significant, meaningful and of consequence. The procedure to be adopted in cases falling under section 34 (1 A) is not intended to be the same as the procedure which has to be followed in those falling under section 34 (1). Learned counsel submitted that inasmuch as both these sections related to the assessment of income profits and gains, chargeable to income tax, that have

assess an opportunity to produce evidence in support of his return under section 23 (2). The next sub-section 23 (3) lays down how the Income tax Officer shall receive the evidence tendered under section 23 (2) and taking such evidence as he himself may find necessary to require on specified points, shall by an order in writing assess the total income of the assessee and discharge the sum payable by him on the basis of such assessment. The next sub-section empowers the Income tax Officer to make an assessment to the best of his judgment in certain cases and also to refuse to register firms or to cancel their registration in the event of default by the firms. Sub-section (2) deals with the avoidance of taxation in the case of firms. Section 23 (1) enables the Income tax Officer as mentioned above to make the assessment on the day specified in the notice issued under sub-section (2) of section 23 or at such date as may be. This section, therefore, requires that a notice under section 23 (2) must precede an assessment under this sub-section. Section 23 (2) requires an Income tax Officer to issue a notice on and file is not satisfied with the returns filed by an assessee under section 12. The provisions of section 23 (3) are, therefore, applicable only to those cases where returns have been made either voluntarily under section 12 (1) or in response to a notice under section 12 (2). The words used in this sub-section are material and may be quoted:

23. (3). If the Income tax Officer is not satisfied without requiring the presence of the person who made the return or the production of evidence that a return made under section 12 is correct and complete, he shall serve on such person a notice requiring him, on a date to be therein specified, either to attend at the Income tax Officer's office or to produce or to cause to be there produced any evidence on which such person may rely in support of the return.

The significance of the firm mentioned in section 24 (1) that the notice issued under that provision should be deemed to be a notice issued under section 23 (2) is realized when we find occurring in section 21 (4) and certain other provisions of the Act definite reference to the notice issued under section 23 (2). It may be noted

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that section 23(2) contains no reference, whatever, to any notice issued under section 24(1). In the absence of the above facts introduced by the use of express words in section 24(1) that the notice is to be issued under that section and is to be deemed to be a notice under section 22(2), section 23(2) would not be applicable at all. The Income tax Officer is bound to give an opportunity to the assessee to produce evidence in support of his return only if the return is filed under section 22. By reason of the facts mentioned above, the notice issued under section 24(1) is to be deemed to be a notice under section 22(2) and, therefore, the Income tax Officer before making an assessment has to issue notice under section 23(2) of the Act asking the assessee to prove his return. After this opportunity has been given and is duly fixed for the purpose, the Income tax Officer may proceed to make an assessment under section 23(3) in the case of a notice issued under section 24(1), as in the case of a notice issued under section 22(2) itself. Section 24(1) lays down that, the provisions of this Act shall so far as may be, apply accordingly as if the notices were a notice issued under that sub-section. This makes section 22 applicable to cases under section 24(1) also for all the provisions of this Act are to apply as if the notices were a notice issued under that sub-section. This makes section 22 applicable to cases under section 24(1) also for all the provisions of this Act are to apply as if the notices were a notice issued under section 22(2). Section 25 of the Act, therefore, which is a provision relating to assessment, is to apply to a case under section 24(1) and it is only then that an appeal may be preferred against the assessment under section 30 to the Appellate Assistant Commissioner. Section 30 has no reference to an assessment under section 24(1) and among the persons who may prefer an appeal under section 30 is an assessee objecting to the amount of income assessed under section 23. This right has not been specifically conferred on any person assessed under any provision other than section 23 of the Act. The second appeal to the Appellate Tribunal can only be preferred by an assessee who has first preferred an appeal to the Appellate Assistant Commissioner so that a person who has not been assessed with a notice under section 22(2) or with a notice which may be treated as one under section 23(2) by a fiction of the law cannot be assessed under section

25 cannot prefer an appeal to the Appellate Assistant Commissioners and cannot go up on a second appeal to the Tribunal. The question of coming to the High Court or going up to the Supreme Court under the provisions of the Act does not arise. I am inclined to accept Mr. Parthasarathy's argument that use of the words 'as if the notice were a notice issued under that sub-section' (under section 24 (1)) was intentional, and calculated to introduce a fiction which was considered to be essential in order to enable a procedure prescribed in the Act for cases where a notice had been issued under section 22 (2) and make certain other provisions available for applications which in the Act contain specific reference to section 22. Some of such provisions may be mentioned. Section 24 A deals with cases where a partition has taken place in a joint Hindu family and provides how the tax may be apportioned between resident members of the family.

Where at the time of making an assessment under section 25 it is deemed by or on behalf of any member of a Hindu family to have assumed as undivided that a partition has taken place among the members of such family. The assessment has to be under section 25 beginning with a notice under section 22 in order to enable an assessee to claim the advantage of this provision of the statute. Similarly section 28 (1) which deals with what is to happen when a change takes place in the constitution of a firm says— 'Where at the time of making an assessment under section 25 it is found that a change has occurred in the constitution of a firm or that a firm has been newly constituted the assessment shall be made on the firm as constituted at the time of making the assessment.' There is no reference to a change that may be found at the time of making an assessment under section 24. I do not think it can be urged that this section so refers to section 24. It is immaterial or without any significance. In section 24 B sub-section (2) which deals with the procedure in case a person dies before he is assessed, there is specific reference both to section 22 as well as to section 24. The provision is as follows:

24 B (2) Where a person dies before the publication of the notice referred to in sub-section (1) of

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section 22 as before he is served with a notice under sub-section (2) of section 22 or section 34 as the case may be has income, advertisement or other legal representative shall on the serving of the notice under sub-section (2) of the section 22 or under section 34 as the case may be, comply therewith, and the Income tax Officer may proceed to assess the total income of the deceased person as if such income, advertisement or other legal representative were the assessee.

Section 27 has no reference to section 34 and deals with cases where defaults have been committed at stages of a notice under section 22 (1) or (2) or (4) or section 23 (2) of the Act. When we come to section 28 we again find a reference to section 34. This section says:

28. (1) If the Income tax Officer, the Appellate Assistant Commissioner or the Appellate Tribunal, in the course of any proceedings under this Act, is satisfied that any person—

(a) has without reasonable cause failed to furnish the return of his total income which he was required to furnish by notice given under sub-section (1) or sub-section (2) of section 22 or section 34 or has without reasonable cause failed to furnish it within the time allowed and as the notice required by such notice.

Provided that—

(a)

(b) Where a person has failed to comply with a notice under sub-section (2) of section 22 or section 34 and proves that he has no income liable to tax, the penalty imposed under this sub-section shall be a penalty not exceeding twenty-five rupees.

As mentioned above, section 34 has no reference to section 24 as such and it is only when a person has been assessed under section 22 that he can go up in appeal to an Appellate Assistant Commissioner. In the absence of the notice requiring the notice under section 34 to be issued as one under section 22 (2), the assessment cannot be treated as one having been made under section 22 and no

appeal would, therefore, lie to the Appellate Appraisement Commissioner. The powers of the Commissioner under section 53 A are, however, not restricted to proceedings under section 53 and he is competent to call for the record of any proceeding under this Act and make such copies or pass such orders therein as he thinks fit. This is obviously comprehensive enough to empower a Commissioner to send for the record of proceedings under section 54 even if the person relating to the matter be not there and to pass such orders therein as he considers proper. Under section 53 B (2) (a) the Commissioner is not competent to pass an order under sub-section (1) of section 53 B to review an order of reassessment made under the provisions of section 54. This restriction of section 54 indicates that assessments under sections 53 and 54 were both distinctly in view when those provisions were enacted. It appears, therefore, from the above that it is not possible to treat a notice issued under section 54 (1 A) exactly as par with a notice issued under section 54 (1) of the Act. The expression "as if the notice were a notice issued under that sub-section" does not find place in the new section 54 (1 A). The question is whether the omission results in any difference between the two notices and the procedure to be followed on the issue of those two notices. It has been contended that the expression "thereupon the provisions of this Act shall, so far as may be apply accordingly" is comprehensive enough to make all the other provisions of this Act applicable except those mentioned in clauses (i) and (ii) of proviso to sub-section (1) of section 54 and in subsections (2) and (3) of section 54. In the first place it does not appear correct to take the view that in spite of a difference in language the meaning of the two provisions must be taken to be the same. A fiction is intended to be introduced in section 54 (1) so that a notice issued under section 54 (1) may be treated "as if" it were issued under section 53 (2). Had it been intended that a similar fiction should attach to a notice issued under section 54 (1 A), there appears to be nothing why the Legislature should have dropped the relevant phrase when enacting

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section 34(1 A). Those provisions of the Act whose application has been expressly excluded may be considered. Clause (14) of the proviso to sub-section (1) of section 34 provides that the Income tax Officer shall not issue a notice under clause (a) of section 34(1) unless he has recorded his reasons for doing so and the Commissioner is satisfied on such reasons recorded that it is a fit case for the issue of such a notice. The proviso to section 34(1 A) requires the Income tax Officer not to issue a notice unless he has recorded his reasons for doing so and the Central Board of Revenue is satisfied on such reasons recorded that it is a fit case for the issue of such notices. When the new provision requires the Central Board of Revenue to be satisfied, it was obviously necessary to make it clear that the satisfaction of the Commissioner was not relevant. Clause (14) of the proviso to section 34(1) refers to the periods of eight years and four years mentioned in section 34(1) and, as these periods are not mentioned in section 34(1 A), this clause was also evidently inapplicable. Section 34(2) refers expressly to assessments in respect of the circumstances falling under clause 34(1) (b). This provision therefore should not apply to section 34(1 A). Section 34(2) deals expressly with cases of assessments under section 23 and says that no such assessments shall be made after the expiry of eight years or four years from the end of the relevant assessment year as provided in that section. This again is evidently inapplicable to section 34(1 A), which imposes an assessment to be made within any period of limitation being prescribed for such assessment. These exceptions furnish as clear as can be, the other provisions of the Act would apply. Section 34(1 A) says that the provisions of this Act shall, so far as may be apply accordingly. If we examine section 23 and try to apply the provisions of that section to proceedings started by a notice issued under section 34(1 A), we find that unless the various provisions of section 23 are modified, they cannot be made applicable to section 34(1 A). Section 23(1) says

23 (1) If the Income tax Officer is satisfied with out requiring the presence of the assessor or the

production by him of any evidence that a return made under section 22 is correct and complete, he shall receive the total income of the estate and shall determine the sum payable by him on the basis of such return.

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This evidently relates to a return made under section 22. A return made in response to a notice under section 34(1 A) is certainly not a return under section 22 and the provision of the statute as it stands is inapplicable. Similarly section 22 (2) requires an Income tax Officer who is not satisfied with the return made under section 22 to give an opportunity to an assessee to produce evidence in support of that return. Again if the return filed under section 34(1 A) cannot be treated as a return under section 22 the provision cannot be applied. Section 22(2) refers to subsequent proceedings and section 22(4) again deals with persons in default of notice issued under sections 22 and 23. These provisions therefore do not in such apply to proceedings under section 34(1 A). It is contended that the procedure prescribed under these provisions is based on principles of natural justice and should be followed in cases where the notice has been issued under section 34(1 A). It may be that when making an assessment under section 34(1 A) the procedure consistent with the principles of natural justice may have to be followed, but that is not the same thing as applying the provisions of the Income Tax Act to such proceedings. The section says that the provisions of the Income Tax Act shall apply so far as may be. Thus in my opinion, means so far as they may be applied. I am unable to read in this provision a direction that the provisions of the Income Tax Act should be applied *mutatis mutandis* with such changes as may be necessary to make them applicable to proceedings under section 34(1 A). It appears to me that the provisions of the Income Tax Act should apply to proceedings under section 34(1 A) only so far as they can be applied without any change in the language of those provisions and when there is no conflict between those provisions and section 34(1 A). If the language used in section 22 is such that it applies to cases only to cases

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where a return is filed in response to a notice under sec-
 tion 22 I find myself unable to accept the contention that
 the section should also be made applicable to a return
 filed in response to a notice issued under section 34 (1) A.
 I find that there is no warrant for reading section 34 (1) A
 for section 22 wherever the latter section is mentioned in
 section 23. The whole of the section should be applied if
 possible and if we apply the entire section 23, reference
 to returns under section 22 will be there and the provisions
 of section 23 relating to assessments to be made after
 returns have been filed under section 22 will also be there
 and it will not in any way improve the situation and I
 do not see how an assessment made under section 34 (1) A
 may be treated as an assessment made under section 23.
 It is to remove the difficulty that the section was intro-
 duced in section 34 (1). Section 34 (1) A does not say that
 the other provisions of the Act will apply to such assess-
 ment as may be necessary. In this connection it may
 be worth recalling section 21 of the Excess Profits Act.
 That section reads as follows:

The provisions of sections 4 A, 4 B, 13, 13 A, 24 B,
 25, 26 to 45 C (inclusive), 45 to 48 (inclusive),
 48 E, 49 F, 50, 54, 61 to 65 (inclusive), 65 to 67 A
 (inclusive) of the Indian Income Tax Act, 1922
 shall apply with such modifications, if any, as may be
 prescribed, as if the said provisions were provisions
 of this Act and referred to excess-profit tax instead
 of to income tax and every officer exercising powers
 under the said provisions in regard to income tax
 may exercise the like powers under this Act in regard
 to excess profit tax in respect of cases assigned to
 him under sub-section (3) of section 3 as he exercises
 in relation to income tax under the said Act.

The provisions of the Income Tax Act mentioned in
 section 21 of the Excess Profits Tax Act were made to
 apply with such modifications, if any, as may be pre-
 scribed. There is no such provision in section 34 (1) A
 enabling one to apply the other provisions of the Income
 Tax Act with such modification as may be necessary.
 The law only says that the other provisions of the Act may

be applied so far as may be only and if they cannot be applied as they stand, they cannot be applied at all.

It was argued that among the provisions of the Act made applicable to section 34(1) (b) is section 34(3) as well along with its proviso and the fiction would thus be available even if the notice be issued under section 34(1 A). The fiction is restricted to a notice issued under section 34(3) and even if it be assumed that section 34(1) would apply, the fiction cannot be torn away from its moorings and be made applicable to a notice issued under section 34(1 A). Besides sections 34(3) and 34(1 A) are parallel provisions and I am unable to see how the main part of section 34(1) can be applied at all to section 34(1 A). The three provisos and the explanation to section 34(3) deal with matters which may be said to be relevant to the main provision. Of these provisos (a) and (ii) were found to be obviously inapplicable and have been escaped. For the same reason the main provisions of section 34(1) which deal with cases where notices are to be issued under section 34(1 A) and 34(1 B) would not apply to a notice issued under section 34(1 A). It may be noticed, however, that the worded proviso which says that the tax shall be chargeable at the rate at which it would have been charged had the income, profits and gains not escaped assessment or full assessment, as the case may be, is not escaped for the proviso can obviously be applied to a case of an assessment made under section 34(1 A). Similarly the explanation also may be found to be applicable to section 34(1 A).

An argument has been advanced that if the provisions of sections 23, 30, 31, 33 and 34 are not made applicable the entire object of the Legislature to assess income of the class mentioned in section 34(1 A) would be frustrated and the Legislature cannot be isolated with having put on the Statute Book a piece of legislation which was abortive or ineffectual. Section 34(1 A) empowers the Income tax Officer not only to issue a notice as mentioned in that section but goes on to say that he may proceed to assess or reassess the income, profits or gains of the assessee for all or any of the years referred. It is contended that this empowers an Income tax Officer to

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states the income tax does not empower him to levy the tax. Our attention was directed to section 23(2) which says that the Income tax Officer shall by an order or writing assess the total income of the assessee and determine the sum payable by him on the basis of such assessment. It is contended that the determination of the sum payable by the assessee on the basis of an assessment is essential to impose a liability on the assessee.

Section 3 of the Income Tax Act is the charging section. It reads as follows:

3. Where any General Act enacts that income tax shall be charged for any year at any rate or rates (or at that rate or those rates shall be charged for that year in accordance with and subject to the provisions of this Act in respect of the total income of the previous year for every individual, Hindu, undivided family, company and local authority, and of every firm and other association of persons or the partners of the firm or the members of the association individually

The section lays down that tax shall be charged in respect of the total income of the previous year of an assessee. The determination of the total income, therefore, is a very important thing to be done under the Act. Section 4 which deals with the application of the Act to various kinds of income says how the total income is to be ascertained and total income has been defined in section 2(17) as meaning the total amount of income, profits and gains computed in the manner laid down in the Act. The determination of the tax payable on the total income is in fact levying a charge of tax which section 3 requires to be done. The words assessee and assessment have not been defined in the Act, but assessee was defined originally as a person by whom the tax was payable and the assessee now, under section 2(7), means a person by whom income tax or any other tax of money is payable under the Act and includes every person in respect of whom any proceeding under the Act has been taken for the assessment of his income or of the loss sustained by him or of the amount of refund.

due to him. Land States on the Right on Income tax, Voluntary 1 or page 166, (Revised Edition's) same.

For income tax purposes, auditing means the process of making adjustments and covers the process from the examination of the completed return forms if any to the issue of the notices of assessments, choosing the amounts of tax payable.

In this country the word assessment is used in the Indian Income Tax Act has been held to have a very comprehensive meaning varying with the context. In *Commissioners of Income Tax Bombay and Ahmed v. Khenshad Bhandari* (1) Lord Russell observed as follows:

One of the peculiarities of most Income Tax Acts is that the word "assessment" is used in meaning some times the computation of income, sometimes the determination of the amount of tax payable and sometimes the whole procedure laid down in the Act for imposing liability upon the taxpayer. The latter income tax is no exception in the respect.

Is South Dakota One Step? Commissioner of Income Tax
John Lord, Says No

Some confusion arises from the fact that in the Axi the words *assumes* and *assumes* are used in different places with different meanings.

The same view was taken by a bench of the Bombay High Court in *Commissioner of Income Tax v. Jagan Nath Prasad Ramnath (P. Chaudh. C. J.)*, observed:

Now it is perfectly true that the expression "income" has been very widely construed, and it has been observed that it bears a different meaning according to the context in which it is used, and we accept Mr. Kolish's contention that in section 30 we read, construe the expression "income" as its widest meaning. Therefore "income" may not only be the compensation of the service, it may not only be the determination of the amount of tax payable but it may refer to the whole procedure laid down in the Act for assessing liability upon the tax payer.

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100 The learned Chief Justice followed the dictum of the
 101 Privy Council in *James Charles Beckett's case* (1). The
 102 House of Lords had occasion to consider what "assess-
 103 ment" means under the English Act. The *Income-tax*
 104 *Commissioners v. Gable* (2) (the Lord Chancellor, (Vis-
 105 count Simon), observed at page 115

106 The word "assessment" is used in our Income Tax
 107 Code in more than one sense. Sometimes by "assess-
 108 ment" is meant the fixing of the sum taken to repre-
 109 sent the actual profits for the purpose of charging tax
 110 upon it. But in another sense the "assessment"
 111 may mean the actual sum in tax which the taxpayer
 112 is liable to pay on his profits.

113 The above observations by learned Judges relating
 114 to the meaning of the word "assessment" do appear to
 115 support the view that the words "may proceed to assess"
 116 do signify that income as section 24 (1 A) means not
 117 only to compute or recompute the income, but also
 118 to levy the tax chargeable on such income. Once this
 119 meaning is accepted, it cannot be said that section 24
 120 (1 A) would be redundant or superfluous or that the
 121 Income-tax Officer would have no say in his hands after
 122 determining the total income at the period to be assessed
 123 as section 25 being inapplicable he may not determine
 124 the tax payable. The whole object of assessing the total
 125 income is to levy the tax. Section 3 says tax shall be
 126 charged on the total income. Section 28 says that where
 127 any tax is due in consequence of any order passed under
 128 or in pursuance of the Act the Income-tax Officer shall
 129 serve upon the assessee or other person liable to pay such
 130 a notice of demand in the prescribed form specifying the
 131 sum so payable. In fact the liability to tax is created by
 132 section 3 read with the Finance Act passed each year.
 133 The liability is on the total income according to the
 134 rates mentioned as applicable to that total income, under
 135 the Finance Act and the person whose total income is
 136 assessed becomes liable to that tax under the law. It is
 137 not of much significance that the mere work of calculat-
 138 ing the amount payable by that person is not expressly
 139 mentioned as required to be done by an Income-tax

Officer under section 34 (1 A). The Income-tax Officer is required under the last to issue the notice and even if the words be taken to have a restricted meaning the Income-tax Officer after ascertaining the total income has to issue a notice of demand under section 29 because in consequence of the order passed by him determining the total income for the purposes of the Income Tax Act, he has the implied duty to charge the income or to arrears the tax due to give effect to section 3 of the Act, read with the Finance Act of that year. The second proviso to section 34 (1) which is applicable to 34 (1 A) says that the tax shall be chargeable at the rate at which it would have been charged had the income not escaped assessment, etc. This clearly indicates the rate to be applied and obviously no question of tax could arise if the tax had not to be determined on the basis of the total income found liable to tax. After a notice of demand has been issued under section 29 there is no difficulty relating to recovery of the tax. Section 46 applies to all cases where a notice under section 29 has been issued. Similarly if a person is in default and has not paid the tax within the time allowed, the procedure setting out the mode and time of recovery in section 46 becomes available. But the person assessed under section 34 (1 A) cannot question the assessment by an appeal because a right to appeal is not given to persons who have been served with a notice of demand under section 29. This right is given to persons assessed under section 25 and to other persons affected by certain other orders mentioned in section 30. I can see, therefore, no force in the argument that section 34 (1 A) will become completely inoperative and mean nothing unless the Section referred to above is adopted in construing it.

What the last says is that the other provisions of the Act, so far as may be, would apply. One of the provisions of section 34 (1) is that the notice issued under that sub-section is to be treated as if it were a notice issued under section 32 (3). This provision as a whole is applicable to a notice issued under section 34 (1 A).

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It is my opinion it would not be correct to apply the provisions of section 34(1) only to the extent of making a notice *de facto* available in respect of a notice issued under section 34(1A) and in holding that the use of section 34(1) was not applicable. So far as may be used in section 34(1A) means so far as the provisions as they stand can apply. The expression does not justify any amendment, adjustment or change in the previous weight as to be applied to that it was not the provision of section 34(1A). In fact the same words so far as may be used in section 34(1) where the Legislature found it necessary or expedient that the notice issued is to be treated as a notice under section 32(2). The outcome is expedient that the same in section 34(1A) has to be explained. The context shows that the outcome was not merely or used expression. But can it be read with any justification that respect division of the issue was not made because the other provisions of the Act which were made applicable included section 34(1). Section 34(1) does not say that any notice issued calling for a return is to be treated as one under section 32(2). It only says that the notice issued under section 34(1) is to be so treated. The phrase, therefore, is not available as a notice issued under section 34(1A).

If the above construction be correct, section 34(1A), enables a person to be packed out from the general class of persons whose names has escaped agreement to be dealt with under that provision and to be subjected to a discriminatory treatment for which there is no justification. The discrimination mentioned by the Supreme Court in *Sanyal Mill Mills & Co. v. Feroz-ul-Haque* (1) will persist. The discrimination according to learned counsel for the applicant is not restricted to procedure only. Besides the valuable rights of appeal and reference to higher authorities being denied a person chosen for treatment under section 34(1A) may be proceeded against without any limitation of time. The persons for whom right of appeal period of limitation is prescribed under section 34(1A) are persons who have issued or failed to file a return or to disclose fully or truly all

material facts necessary for their assessment. If a person avoids filing a return or deliberately files a false return and gets himself assessed on that basis he is by no means a very desirable person. There is nothing in section 34(3) to show that this provision will not apply to every case of concealment of income resulting in the income escaping assessment. All sorts of devices have been found to have been used by unscrupulous persons, and under section 34(3) persons who make losses, profits during the year or during other periods of default, for the return have not been excepted. All such persons may be proceeded against under section 34(3). The introduction of section 34(1 A) empowers the Income tax Officer to pick and choose some of such persons who have made profits during the year period and have escaped assessment or have been under-assessed on such profits provided the profits are substantial and the test for this is that such income should not have been less than Rs. 1,00,000. While the time limit of persons may be proceeded against under section 34(3), the power given to the Income tax Officer to proceed against some of the persons of that class under section 34(1 A) which does not provide for an appeal or reference as mentioned above is clearly discrimination which offends Article 14 of the Constitution. The validity of section 34(3) was challenged on another ground before a Bench of the Madras High Court in *Sri Rajendra Mills Ltd. v. Income-tax Officer* (1). But the point now raised by Mr. Palkish, in the present case, was not raised before that Court. A learned Judge of the Calcutta High Court also had an occasion to consider the validity of section 34(1 A) in *Lalla Prasad Shah v. The Income-tax Officer, Central Circle 771*. A copy of the judgment was made available by learned counsel for the department. In that case also the validity of the section was not challenged on the ground on which it is assailed in the instant case. These decisions, therefore, do not afford any guidance in the decision of the present applications.

(1) (1957) 31 I.T.B. 428.

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It has been argued that section 58 (i A) was introduced in the Income Tax Act because the Supreme Court had in its decision held certain provisions of the Taxation on Income Investigation Commission Act to be ultra vires and as offending Article 14 of the Constitution and that therefore, the object of the Legislature was to do away with a different kind of procedure in the case of persons who had earned huge profits during the war and who were intended to be dealt with under the Taxation of Income Investigation Commission Act and to provide that the same procedure should be followed in their case as in the case of other assessors under the Income Tax Act. It is difficult to be sure as to what the intention of the Legislature was and the safest way to ascertain such intention is to look at the language used by the Legislature. The authorities concerned did want such persons as had not paid proper taxes on large profits earned during the war to be treated on a different footing from ordinary assessors under the Income Tax Act. It is clear from several legislative attempts made to give effect to such intention. The Excess Profits Tax Act which was passed soon after the war broke out and which provided for taking away a substantial part of such profits as could be attributed to the difficulty and uncertain times. When the Excess Profits Tax Act had remained in force for several years and the war had ended and the authorities found that taxes had not been paid by all such persons who should have paid them on the large profits earned by them during the war and the authorities were of the opinion that the ordinary procedure prescribed under the Income Tax Act was not adequate enough to rope in such persons and recover from them the taxes which they should have paid, the work was entrusted to the Investigation Commission appointed under the Taxation of Income Investigation Commission Act. When it was found by the Supreme Court in several cases mentioned by my learned brother, that the procedure adopted under the Investigation Commission Act was discriminatory and the relevant provisions of the Taxation of Income Investigation Commission Act were void, the authorities concerned again found it necessary to set up some statutory provision under which

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called upon to file a return should have an opportunity of being heard in support of his return and that he should have an opportunity of explaining such facts or circumstances as might appear to be against him and his case should be decided fairly and not in an arbitrary manner. The principles of natural justice do not require that any appeal should also be provided. Nor do they require that a reference on questions of law must be made. The Legislature had thought it fit to prescribe a more summary procedure through a highly qualified Tribunal when assigning such cases to the Income Tax Investigation Commission and it was evidently at the time that the procedure available in accordance with the principles of natural justice should be adequate to safeguard the interests of such persons when providing that they should be dealt with by the same officer who assessed other persons under the Indian Income Tax Act. But it is not necessary to indulge in surmises or to find reasons for what the Legislature has done when the language of the statute clearly expresses the intention of the Legislature.

Certain principles of interpretation were also discussed in the case. It was urged that a court should be reluctant to accept an interpretation that leads to the invalidity of a law. I have no hesitation in accepting the principle. But the rule would apply only if there be any doubt relating to the interpretation of the statute. If the language does not admit of any ambiguity, no question of applying any such principle of interpretation could arise. The Supreme Court as well as the High Courts in India have from time to time found various provisions of different statutes invalid and unconstitutional. They have always had in mind the principle enunciated above but were obliged to declare the statute concerned or its provisions unconstitutional when the language used did not admit of any doubt as to the meaning of the statute. It is only when two or more interpretations are possible, and that one leading to invalidity is to be avoided.

Section 24(1 A) has also been annulled on the ground that it provides a different period of limitation for the

class of persons. As observed by my brother Sutherland, J., in respect of one year at least persons of the same class may be dealt with by the Income tax Officer under section 34(1) of the Act. It is to my mind, demonstrative to afford a larger period of limitation for the assessment of some persons who may be chosen to be dealt with under section 34(1 A) even if it be in respect of one year of assessment. On this ground too the provision appears to offend Article 14 of the Constitution.

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I must say that I have felt considerable hesitation in expressing my dissenting views because of certain observations made by the Supreme Court in *In re Muralidhar Math v. Asst. P. Commissioner Income Tax* (1). In that case section 3(1) of Act XXX of 1947 was impugned and in that connection section 34(1 A) inserted by Act XXXIII of 1954 was considered as amounting to deal with the class of persons who were said to have been classified for special treatment under the Taxation of Income Investigation Commission Act. In that case, however, no question was raised as to whether the procedure to be followed in the case of persons to be dealt with under section 34(1 A) was different from the procedure prescribed for the persons to be proceeded against under section 34(1) of the Act. The Supreme Court, if I may say with great respect, proceeded to decide the case on the assumption that the procedure under section 34(1 A) was the same as that under section 34(1) of the Income Tax Act. I have tried anxiously to study the case and to see if the points now raised, did come to the notice of the Supreme Court in that case, for even the assumptions on which the Court proceeded, is entitled to respect and consideration. I could not find any light in that decision on the questions now raised by the present applicants. As I could find no justification for ignoring the patent difference in language used by the Legislature in section 34(1 A) and in section 34(1), I thought it proper to express my own views.

On the other ground, which in fact was raised by the Advocate General, in a connected case that the provision in the law that an Income tax Officer should decide what

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we be would impose on an assessor offered against the principles of natural justice, I would agree with my learned brother. The principles of natural justice could be called in aid only if the provisions of the statute were not available. It is for the Parliament to consider and recognize the principles of natural justice and to embody them, so far as it considers proper, in the statute enacted. If the Parliament considered it proper that the assessment of tax should be made not by a regular court but by an officer of the Income Tax Department, the Legislature was fully competent to give effect to this view in the law it made. For several reasons administrative Tribunals are increasingly coming into vogue. The multiplicity of cases which a modern State is called upon to undertake make it impracticable that the normal procedure for adjudication of disputes by courts may be resorted to in every case. What tax a person should pay and who should be held liable to pay taxes on different kinds of income, are questions of considerable importance and certainly affect the persons concerned much more than a small claim in a court of law. Similarly questions relating to labour and trade unions and conservation versus municipalities, etc., give rise occasionally to very important questions involving considerable sums of money and yet an ordinary court has not been found to be a convenient forum for the settlement of such disputes and a large number of arbitrators and Tribunals have sprung up to deal with these matters. It was competent for the Legislature to lay down that the imposition of the income tax payable should be made by an Income Tax Officer who should decide all relevant questions relating to such assessment. It may be noted that provisions relating to appeals to the Appellate Assistant Commissioner and the Income Tax Appellate Tribunal enable an assessor to get his matter heard by persons other than those who are responsible for the levy and collection of the tax. Thus it is calculated to ensure impartial decision of the questions raised at the assessment.

The provisions relating to a reference to the High Court and then an appeal to the Supreme Court further ensure that the law will be correctly interpreted and applied. As observed by my brother DAWSON, J., the fact is

G. Nagendra Rao v. A. P. S. R. T. Corporation (1) were quite different and the rule laid down by the Supreme Court is that case does not apply to the present application.

Before parting with this judgment I must acknowledge the help received from the illuminating and learned arguments addressed by Mr. E. S. Fustak for the applicants and Mr. Gopal Behari for the department.

For the reasons given above I am of opinion that section 34 (1 A) offends Article 14 of the Constitution and is voided. I would, therefore, allow the applications with costs.

By the Court—Both the writ petitions are dismissed with costs, which will include Rs 400 in each writ petition as fee of learned counsel for the department.

Costs awarded.

APPELLATE CIVIL

Before Mr. Justice Gupta and Mr. Justice Dwivedi.
RAM SWARUP and ANOTHER (Deceaseds)

1959
April 4

P.
PATTU (Plaintiff)

Warranty of title—Express contract of indemnity for breach of—Effect of, on the rights and liabilities under the statutory channel—Transfer of Property Act, 1952, s. 55 (2).

The express contract for the refund of sale consideration on case of vendor's disavowal from the property sold for want of vendor's title does not deprive the vendee of his right to rely, if necessary, on the statutory warranty ensured by s. 55 (2) of the Transfer of Property Act and recover compensation for the compensation paid in compensating the cost for possession of that property by persons entitled to it.

Where the vendee is a party to the suit in compensation and prays to allow it to conclude, in part as against him, the same must be to meet all the elements of an express notice to him as a safeguard against improvement charges.

Narain Kumar v. Bharat Construction Co. and Durga Kumar v. Kish Charan (2) referred to.

(1) A. I. R. 1958 S. C. 348. (2) A. I. R. 1958 May 128.
 (3) 122 (2) I. L. R. 35 All 147.

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Ram
Prakash
v.
Fattu

Second Appeal No 787 of 1951, from a decree of
Fattu Prakash, Additional Civil Judge, Mandla Nagar,
dated the 17th February 1951.

The facts appear in the judgment.

Fattu Prakash for the appellant.

M. H. Begg for the respondent.

Cause, J.—The sale deed in this case was executed
by Ram Swarup, one of the defendants appellants before
us, on his own behalf and on behalf of his brother, Joti
Prasad, the second appellant before us transferring
certain property to Fattu, who is the plaintiff respondent
in this appeal.

The vendor was put in possession of the property.
The sale consideration paid by the vendor was Rs 180.
In the sale deed, there was a covenant to the following
effect:

*Har mahar maharaja par maharaja ka qasam hain
detya Agar par ya har qasam maharaja se milal
pave to maharaja ko shikayat hogi ki mere varman
mai soad vapas wani kar le*

Two sons of Ram Swarup, appellants, namely, Daya
Prakash and Anand Prakash, filed a Suit no 1178 of
1944 claiming that the property transferred was a joint
Hindu family property and was not liable to be trans-
ferred for want of legal necessity. To that suit, they
impleaded Fattu, the vendor, and also their uncle, Joti
Prasad as also their father, Ram Swarup, the two vendors.
The suit named two persons, i.e., the vendors did not
contest the suit at all and did not file any written state-
ment. The suit was ultimately compromised between
Fattu and the plaintiffs of that suit, the compromise
being that if Fattu paid Rs 1,180 to the plaintiffs of that
suit within a period of six months, then the plaintiffs'
suit would stand dismissed and Fattu's possession over
the vendee property would remain undisturbed.

It appears that the sum of Rs 1,180 was not paid within
the stipulated time but in execution proceedings there
was a further compromise wherein the sum of Rs 1,180
was raised to Rs 1,800, which was paid and Fattu remain-
ed in possession of the vendee property.

Then Panna filed the present suit claiming damages for breach of the warranty of title.

The suit was defended. The learned Additional Munsif dismissed the suit holding that the plaintiff had no cause of action against the defendants.

Upon appeal before the learned Additional Civil Judge, the appellate court has allowed the appeal and decreed the plaintiff's suit for Rs.525, i.e., the amount of damages which were claimed. The view of the court below was that there had been a breach of the warranty and that the plaintiff had suffered more damages than Rs.525 which was claimed. In the result as indicated earlier, the plaintiff's suit was decreed for a sum of Rs.525.

Before the said court below, a contention was raised that the plaintiff was only entitled to a relief in terms of the covenant which we have quoted herewithbefore and that inasmuch as there was no loss of possession, there was no right to recover damages from the vendor. The court below repelled this contention and held that the plaintiff was entitled to recover the same under the general law of property. It held that the plaintiff could avail of the benefits of section 55 (2) of the Transfer of Property Act which indicates that the seller shall be deemed to contract with the buyer that the vendor which the seller professes to transfer to the buyer subsists and that he has power to transfer the same. The court below rejected the contention that by entering into the specific covenant, which has been quoted here before, the parties have contracted themselves out of section 55 (2) of the Transfer of Property Act. The view of the court below was that unless there had been a contracting out of section 55 (2), Transfer of Property Act in case of a breach of warranty damages could always be claimed by the vendee and that any special covenant entered into between the vendor and the vendee did not deprive him of the right to claim damages on a breach of statutory warranty. The said court has found that it was proved in the suit upon the evidence tendered, that Ram Saurap had no other sons and that the representation made in the sale deed that

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the property was the sole property of Ram Sewrup and his brother, Jai Prasad, was not correct. The court below had also held that the question of a breach of warranty already stood decided by the decree. Ex. 2 on this record, passed in Suit no. 1178 of 1944.

The appellants, Ram Sewrup and Jai Prasad, in this appeal have re-argued the point taken in the court below. The consensus of learned counsel is that inasmuch as there was an express covenant wherein it was stipulated that in case of possession being either wholly or partially lost over the property, the sale consideration with interest would be recoverable, therefore, the warranty which is implied in section 55 (2) of the Transfer of Property Act must be deemed to have been given up by the vendor under the contract. In our view, the court below was clearly right in holding that the specific covenant above said did not destroy the statutory warranty given under section 55 (2) abovesaid. The covenant entered into between the parties dealt with only one specific case and that was that if ever the vendee property possession was disturbed then in such a case, the vendee was given a right to recover the sale consideration with interest. It did not deal with cases uncovered by that covenant and the general right given by section 55 (2) of the Transfer of Property Act, in our view, remained intact. There is nothing in the contract to show that that right has been specifically contracted out and we are in agreement with the view of the court below that the general right under the Transfer of Property Act still remains intact, particularly because the covenant between the parties is, in no way, inconsistent with section 55 (2) of the Transfer of Property Act.

The next contention raised by learned counsel was that the court below had wrongly considered that the question of warranty of title had already been decided inter partes by the decree passed in Suit no. 1178 of 1944. It is correct that the court below seems to think that the matter relative to warranty of title was concluded by the decree passed in that suit, which is Ex. 2 on the record of this case. We are of the view that that decree did not operate as res judicata at all, because in

that was, the vendor and the vendee were both arrayed as defendants and the determination of rights under it was not necessary for the purpose of disposal of the suit, nor was there any such determination either directly or even by implication. The vendee did not even put in appearance and the suit proceeded *ex parte* against them and the plaintiff suit is against the vendor, was disposed of in terms of a compromise entered into between them. Therefore, clearly the judgment and decree in that suit cannot operate as *res judicata* between the present plaintiff and the present defendants, namely, the vendor and the vendee but it is undeniably evidence of the fact that there was a suit brought by the vendee against the vendor and the vendee and it is also evidence of the fact that a compromise entered into under which the vendee was required to pay a certain sum of money to the plaintiff in order that the plaintiff's suit should stand dismissed and in order that he might retain the property. These facts are established by the judgment but the judgment or decree in that suit does not operate as *res judicata*. Fortunately, in this case the plaintiff went into the witness box and the defendants have also gone into the witness box and the court below has recorded an independent finding based on the oral evidence tendered. That court has pointed out that lack of full ownership is apparent from the deposition of Ram Nivara, one of the defendants, wherein he says that he had told the vendee that he had got three other sons alive and that the vendees were not the sole owners of the disputed property. It is evident from a perusal of the evidence tendered that the conclusion of the court below is correct. The defendants in that suit have nowhere denied that the sons also had a share in the property. As a matter of fact, they wanted to suggest that the plaintiff had full knowledge of there being three sons. But the assertion in the deed is quite different. There is no duty cast on the vendee to make enquiries and he may accept the representation made to him by the vendor as regard to the latter's title. In the circumstances, the court below was right in finding that there had been a misrepresentation as regard to

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take and that the warranty had been broken. In the circumstances, damages clearly became payable.

Learned counsel has then contended that the damages awarded were excessive, that the vendors did not put in appearance in the previous suit and, therefore, the settlement made between the vendor defendants on the one side and the plaintiffs of that suit on the other could not be said to be a settlement which would necessarily be binding on the vendors and he urged that it was open to the vendors to show that the vendor had paid an excessive sum of money in order to retain possession of the property.

He then said that no notice had been given to the present defendants, the vendors, before the vendor entered into a settlement with the plaintiffs and they were entitled to question the agreed sum. In our view, the fact that no notice had been given would certainly entitle the defendants to say that the question of quantum of damages could not be deemed to have been finally disposed of.

Even though it was open to further consideration, in this suit as to what damage should be awarded, it seems to us in the circumstances that somewhat as the court below has only decreed the sum due Rs 520 as against Rs 1,100 which the vendor had agreed to pay to the plaintiffs of the previous suit, it cannot be said that the damages have not been properly assessed by the court below.

It was then contended that inasmuch as the property had been sold, in the first instance, for Rs 520 only, the sum there would be only one half of Rs 520 and damages should not exceed Rs 260. We do not think that this is the correct way of looking at the matter. The correct way of looking at the matter would be to see as to what sum the vendor would be justified in paying to persons who had a title and who could dispose of the vendor at least give their share. We consider that in view of the fact that the vendor had already incurred additional expenses in improving the property, he must have been at a disadvantage in bargaining and in the

circumstances, he probably could not make a better bargain. In the circumstances, the sum of Rs. 175 does not appear to be an excessive amount.

It is to be noted that the vendor was parties to the earlier suit and they kept out of the proceedings and allowed the suit to be disposed of *ex parte*. They could have spoken in support of the title they had asserted in their deed and if they had done so, there might not have been a necessity to enter into a compromise of the suit, payment would have been effected at a more nominal sum. We consider that the action of the vendor in compromising the earlier suit and as the figure cannot be seriously questioned in their proceedings.

In *Narayan Kuan v. Bhairao Bhabharn* (1), where the vendor who was impleaded as a defendant to the suit impeaching his title and claiming the vendor's return remained *ex parte*, though the question of title was a matter within his special knowledge, and, therefore, the vendor compromised the suit and subsequently filed a suit for damages against the vendee for a breach of the covenant, it was held that the vendor was liable for damages and he could not have imputed bad faith to the vendee for compromising the suit. Nor do we think that it can be seriously suggested in this case that the vendee, who had, as already indicated, spent money in improving the property, could have allowed it to go out of his possession and then claim reimbursement of the sale consideration together with interest. Where titles are challenged when the warranty is defective, vendors have often compromised with the person challenging the title and they have been held entitled to claim damages from their vendors.

We may refer to one of such cases, which is reported in *Durga Kumar v. Kulachurn* (2). In that case, it was indicated that if a demand about certain property was made which a person, notwithstanding is bound to pay and notice is given to him of the demand on which he takes no action and the person to be redeemed compromises the dispute before the suit is brought, the

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incriminating party is not intended to come forward and say that it was not a fair and reasonable one.

No doubt in this case no notice, as such, was given, but the defendants were parties to the suit and it was their duty, having given a warranty, to come forward and defend the suit rather than to allow the suit to proceed *ex parte*, and even if we do not hold that the conduct of the defendants was suspiciously collusive, in our view the fact that they had been made defendants was enough to give them notice that the suit might be compromised. In fact, they probably knew the exact position. The plaintiffs were their relations, being the sons of Ram Swarup, who was one of the defendants, and they probably knew that the vendor had already spent a sum of money on improvements. We do not think that a direct notice is always required. Moreover, *Durga Kumar's case* (1) was a case where the compromise had been entered into even before the suit.

Having considered the various matters, we have come to the conclusion that the judgment of the court below appealed against is correct. In the circumstances, we dismiss the appeal with costs.

Appeal dismissed

CRIMINAL MISCELLANEOUS

Before Mr. Justice Bhargava and Mr. Justice Sahai
 THE AGRA ELECTRIC SUPPLY COMPANY AND
 ANOTHER.

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 Appeal, 1

STATE AND ANOTHER.

Criminal Proceedings—Inherent power of High Court to issue writs in—When exhausted—Financial power of High Court—Revenue of its pending cases—Code of Criminal Procedure 1908, ss. 439 and 441-2.

On the several complaints filed against defences branches of the U. P. Electricity Supply Company cases were against the company alone were against the company through their Resident Engineer who is now retired should be tried for the offence

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connected to the company and others against the company as also certain other persons such as the Government, Criminal Inquiries or Resident Magistrate in their personal capacity. The respective Magistrates took cognizance of these cases and the proceedings reached the High in all cases of the issue of warrants for the apprehension of the accused in which apprehension had been ensured while in other proceedings, evidence had been recorded.

On an application to the High Court under s 361 A of the Code of Criminal Procedure for the apprehension asked against the above proceedings in the ground: (a) that the alleged breach of the provisions of the Indian Magistrate Act or the Rules made thereunder did not constitute a crime and could at best involve a civil liability of the classification of the offence against the company; (b) that on the face of the complaint itself there was no jurisdiction for the trial of or the issue of the process against the respondents.

Held, (i) that the inherent power of the High Court preserved under s 364 A of the Code could not be invoked, whereas in this case an appropriate relief was available under the express provisions of the Code.

(2) as to (a) that the objections could well be taken before and arise in the usual stage to file for the decision of the Magistrate himself and the applicants could alternatively come to the High Court through a reference or revision against that order and as to (b) that the proceedings against the individuals were illegal and must be quashed and the Magistrates, in other cases must be directed not to issue any process in the name of Resident Magistrate in their personal or mere representative capacity.

Held, further, that the alleged relief could, however, be granted by the High Court not under s 361 A, but under s 489 which by treating the application as such or acting not more as enforcement or revision.

Criminal Miscellaneous Application No 3745 of 1934 (connected with Criminal Miscellaneous Applications nos. 3747 to 3751 of 1934, 3823 and 3834 of 1934, 47 and 48 of 1935, 594 to 598 of 1935, 658 of 1935 and 1268 of 1936).

The facts appear in the judgment.

Jagdish Swaraj and D. D. Srivastava for the applicants.

Chand Lal for the opposite parties.

Observations.—These fifteen applications were presented before a learned Single Judge of this Court involving

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as powers under section 161 A of the Code of Criminal Procedure. The powers were sought to be exercised in respect of *different* different cases which are pending in the Courts of Magistrates in this State in various districts. In all four cases amongst the accused is the local electric supply company also. The designation of the electric supply company varies from place to place. As an example, in Misc. Case no. 2747 of 1954 the supply company which is accused no. 1 is the U. P. Electric Supply Company, Limited, Allahabad. In Misc. Case no. 2749 of 1953 the firm accused is the Agra Electric Supply Company, Limited, Agra. In case no. 1269 of 1954 the firm accused is the Agra Electric Supply Company Limited, Agra. It is not necessary to give the description of each electric supply company in each of these cases. It is enough to say that all these companies are incorporated under the Indian Companies Act and the managing agents of these companies are Messrs. Martin Burt Limited. In the heading in the complaint in Case no. 2830 of 1954 the electric supply company alone is mentioned, without mentioning through whom the company was implicated as accused. In cases nos. 2748, 2750, 2751 and 2829 of 1954 and nos. 47, 48 and 489 of 1955 the supply companies have been implicated as accused through their respective Resident Engineers. In cases nos. 504 and 506 of 1955 the companies have been implicated through three different persons in each case and in Case no. 2749 of 1953 the company has been implicated through four persons. In four cases nos. 2747 and 2748 of 1953 and nos. 505 and 2769 of 1955 not only have the companies been implicated as accused but, in addition, certain other persons have also been implicated as accused. These additional accused in these four cases are either the Managing Director or Directors of the managing agents Messrs. Martin Burt Limited, or the Chief Engineer or the Resident Engineer of the company concerned. It appears, however, that, even in cases where the only accused implicated is the electric supply company concerned, the prayer at the end in the complaint is that the Magistrate shall taking cognizance of the offence

submitted by the company should put on trial the Resident Engineer himself. One ground on which the powers of this Court are invoked by the applicants in these applications is that, on the facts given in the complaints and the reports made in them, there was no justification for the trial of the individuals, whether Resident Engineers or others in their personal capacity. Two other objections that were taken based on grounds arising from the particular offences alleged to have been committed on the facts mentioned in the complaints (the set of cases relates to prosecutions under section 49 of the Indian Electricity Act, 1910, for non-observance of the provisions of clause (iv) (1) of the schedule to that Act). Another set of cases relates to the offence punishable under rule 141 of the Indian Electricity Rules on the allegation of the non-observance or breach of rule 14 of those rules. Learned counsel for the applicants in these applications urged that these prosecutions were not in all justified manner as the provisions, the breach of which was alleged against the accused, and was the subject matter of the complaints, were such that their breach might give rise to civil liabilities or to the liability of cancellation of licence or other penalty but could not be the subject matter of a criminal prosecution.

We have heard Mr. Jagdish Sanyal for the petitioners and Mr. Gopal Behari for the U. P. Electric Inspector as also U. P. State.

When these applications came up for hearing before us a preliminary question arose as to whether, in the circumstances which have been mentioned above, this Court would be justified or would be acting properly in exercising its extraordinary power under section 561 A of the Code of Criminal Procedure as prayed for by the applicants. It appears to us that the remedy which has been sought by the applicants is not appropriate, and there are no sufficient grounds for the exercise of the power under section 561 A of the Code of Criminal Procedure by this Court. In all these cases, summonses have been issued by the Magistrates for attendance of the accused. In some cases all the accused have put in appearances, while in others only some have done so. In

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one case, we are told, proceedings have reached the stage where prosecution evidence has been recorded and only the recording of the defence evidence remains. It appears to us that the points which are being raised before us by means of these applications could have been easily raised and should appropriately have been raised by the accused before the Magistrates, who had taken cognizance of these offences. If the points could be decided without recording any evidence, the Magistrates could have been requested to decide those points and drop the proceedings in case they came to the view that the prosecution could not proceed. The interpretation of the rules or the provisions of the Act must at the initial stage be left to the Magistrates concerned. It is for them to decide what are the rules, the non observance of which renders the persons responsible for the observance of those rules liable for prosecution for the offence made punishable either under section 47 of the Indian Electricity Act or under rule 141 of the Indian Electricity Rules. We do not think that it will be at all proper for us to go into the questions at this stage. If the accused never a decision on these points at a preliminary stage and the Magistrate gives his decision one way or the other, the party aggrieved can always seek appropriate remedy by moving a revision application before the Sessions Judge or the District Magistrate requesting that a reference be made to this Court and, if even that request is refused, by presenting a revision application in this Court. That is the appropriate remedy which is provided under the provisions of the Code of Criminal Procedure and while such a procedure exists we do not think that we are called upon to exercise our extraordinary powers under section 161 A of the Code of Criminal Procedure.

There, however, remains the question relating to the proceedings being taken in these complaints against the persons who are either Resident Engineers of the various supply companies or Governing Directors of the managing agency company or the Chief Engineer of the supply company. It has been urged by Mr. Jagdish Shrivastav on behalf of the applicants that at least the proceedings

against these individuals we totally acquiesced because the complaints themselves do not make out that any officers have been concerned by them. This is also a point which could have been taken before the Magistrate who could have decided it, but considering the circumstance that the report of all the complaints in all the cases have already been put before us and arguments have also been addressed to us by learned counsel for the parties on this point and having regard to the further fact that in at least in one case the Magistrate has continued the proceedings, so the extent of recording the whole prosecution evidence, we think that this is a point which should appropriately be considered by us at this stage as further continuance of the proceedings against these individuals if not at all warranted by law, would wholly result in their unnecessary harassment. Having considered this aspect of the matter carefully, we are still of the opinion that it will not be proper for us to exercise our extraordinary power under section 361 A of the Code of Criminal Procedure. It appears to us that the power which we can properly exercise and should exercise is the one conferred on us by section 439 of the Code of Criminal Procedure. Ordinarily we would have directed the appellants to move the Magistrate and request them to drop the proceedings against these individuals on the ground mentioned above and if the Magistrate had refused to do so the appellants could have come up and moved us under section 439 of the Code of Criminal Procedure either directly or through the Sessions Judge or the District Magistrate. There is however, another aspect which is to be kept in view and it is that in all these cases the Magistrate issued summonses for the appearance of these individuals secured under section 394 of the Code of Criminal Procedure and the question that is being raised really goes to the extent of challenging the correctness and validity of the proceedings taken by the Magistrate in these cases. The Magistrate could raise summonses for the appearance of these persons as secured only if in these opinions the complaints taken together with any statements recorded or responses made under sections

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200 to 202 of the Code of Criminal Procedure showed that an offence had been committed by each of these individuals accused in respect of which summonses could have been issued. In this case it is not suggested that after the complaints were filed any summonses were recorded under section 204 of the Code of Criminal Procedure. In fact, since the complaints were filed by a public servant, Section 200 of the Code of Criminal Procedure did not require his statement to be recorded. It is also not suggested that any enquiry was made under section 201 of the Code of Criminal Procedure so that for the purpose of forming his opinion in order to issue summonses under section 204 of the Code of Criminal Procedure the only material available to the Magistrate were the various complaints. We have therefore to see whether the Magistrate in issuing the summonses acted rightly and, in view of the fact that some of the persons who are being summoned as accused are not even residing in U. P. but at long distances, we think that these cases are appropriate where we should exercise our powers under section 439 of the Code of Criminal Procedure, either on the basis that we should treat them applications as applications under section 439 Criminal Procedure Code, or, as the alternative, on the basis that information having come to us by means of these applications it would be appropriate for us to exercise our powers *quo warrant* under section 439 Criminal Procedure Code. It is in this light that we have heard learned counsel for the parties on this point.

It appears to us that in 11 of the cases (having four cases, in which miscellaneous cases nos. 2748 and 2543 of 1958 and nos 535 of 1959 relate, the only person mentioned as the accused in the charging was the electric supply company concerned. In one case it was not mentioned through whom the company was implicated as accused whereas in all other cases the company was implicated as accused through the Revenue Magistrate. In most of these cases though in the body of the complaints the allegations were in respect of acts of omission by the electric supply company concerned and in

though in the prayer the first part was that the Magistrate is requested to take cognizance of the offence committed by the company, the last part of the prayer was that the person to be put on trial after cognizance was taken was the Resident Engineer. It also appears that as a result of this prayer the Magistrates were highly annoyed and surprised for the Resident Engineers themselves instead of issuing summonses for the appearance of the electric supply companies through the Resident Engineer. Since in the complaints themselves, there was no mention that the Resident Engineers as such had committed any offence and even in the first part of the prayer the request to the Magistrate to take cognizance was only in respect of the offence committed by the companies, it is clear that the prayer for putting the Resident Engineers personally on trial was very inappropriate and should not have been granted by the Magistrates. In all these cases, the accused who was to be tried and who should have been tried was the electric supply company concerned though all the time the company could be directed to put its appearance as accused through the Resident Engineer. We consider that this aspect having come to our notice, a direction should be issued to all the Magistrates concerned to make sure that the trials before them proceed against the electric supply companies through the Resident Engineer concerned, and not against the Resident Engineers themselves in their personal capacities or even by describing the prosecution as being in their representative capacities. When the Resident Engineers appear the appearance would be treated as the appearance of the company being prosecuted. The direct the Magistrate is proceed accordingly.

There were again the four cases in which apart from the companies, certain individuals have been implicated as accused in their personal capacities. We have carefully gone through the complaints in these four cases and we find that in none of these complaints are any facts alleged which would show that there was any breach or non-observance of any provision of the Act, schedule or rules of the Indian Electricity Act, by

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any act of negligence or omission on the part of the individuals. There is not even any suggestion that it there has been any non-observance of any rule or breach of any rule on the part of the electric supply company, which is the principal accused in each of these cases, the responsibility for that non-observance or breach lay on any of these individuals accused. We may also mention that, in all these four cases, the stage is pending, i.e., that the examination of prosecution witnesses has not yet started. In some probably all the accused have put in appearance, while in others that is not so. In fact, the information of the learned counsel appearing for the State in these cases is that in none of these four cases have the individuals accused yet appeared. Consequently in deciding whether the prosecutions are maintainable the only material available are the four cases placed in the four cases and there is no additional material by way of evidence, which needs to be considered by us. On the facts given in the complaints it is clear that the facts alleged by the complainants do not even make out a prima facie case against any of these individuals for breach of any of the rules framed under the Indian Electricity Act or the provisions of that Act as there are no incriminating allegations against these individuals. The proceedings that are being taken in the trial of these individuals are, therefore, without any justification. No summonses should have been issued against them under section 204, Criminal Procedure Code and they should not have been put on trial. In cases where they are not yet on trial there is no justification for enforcing their attendance in court and putting them on trial. We, therefore, consider that the proceedings against these individuals going on under these complaints should be quashed by us in exercise of our powers under section 489 of the Code of Criminal Procedure. We accordingly quash all proceedings in these four cases against these individuals accused and we send the orders of the Magistrates directing issue of summonses for their attendance under section 204 Criminal Procedure Code. We may make it clear that this order will in no way affect proceedings which might be taken by the

Migrants on these complaints against the electric supply companies concerned provided those proceedings are taken in accordance with the principle which we have laid down in consonance with the reasoning in *acced*. The stay orders in all these cases are hereby set

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Applications allowed

CIVIL MISCELLANEOUS

*Before the Honourable G. H. Mookham, Chief Justice,
and Mr Justice Mukherji*

1939
April 17

T. P. BHALLA, in the matter of enrolment

Enrolment of Advocates—Power of High Court in matters of—
Provisions under the Lawyers' Patent, subject to those under
the Councils Act and the rules thereunder—*Interim Patent*
(*Advocate's*) 1930 Act (1) and (*Re-Enrolled Persons High*
Court (Amalgamation) Order, 1940, of the Indian High
Courts Act 1925 s. 5 (1) (2) (3)—*Advocate's* for Council
Rules, r. 1

Judicial Officer—Meaning of for purposes of enrolment as an
Advocate

The power of the High Court regarding the enrolment of
Advocates under clauses 7 and 8 of the Lawyers' Patent preserved
throughout of 8 of the Amalgamation Order must now be read
in conjunction with and as subject to the provisions of the
Bar Councils Act, and the rules thereunder, and the
provisions under that statute the High Court retains unfettered
power to refuse or at discretion, admission to any person to the
roll of *Advocates*. It can no longer refuse to an *Advocate* a
person who is not qualified under the Act and the rules thereunder.

Pravesh Chandra Gupta v. The Registrar, High Court of
Judiciary at Allahabad (1) and M. Abdul Fatah v. The Bihar
High Court for Councils (2) distinguished.

The enrolment of a person as an *Advocate* on the ground
of his having held judicial office is confined exclusively to
members of a judicial service and is not available to persons of
any other service even though it may involve performance of
duties of a judicial nature.

In the matter of enrolment of Mrs. H. P. Chandra (2)
referred to.



Civil Misc. Case No. 181 of 1949

The facts appear in the judgment

The judgment of the Court was delivered by—
for the Appellant
for the Bar Council

MAHOMED, C. J. —We have before us to day an objection by the Bar Council to the admission of Sri Tejasa Prasad Bhalla as an Advocate in this Court.

Rule 1 of the Rules made by the Bar Council under section 9 of the Indian Bar Councils Act states generally the qualifications for enrolment as Advocate but so that rule there are a number of provisions of which the first, so far as it is relevant, reads thus:

Provided, firstly, that a person who is a graduate in law may be admitted to the Roll of Advocates: (a)

(c) he has held judicial office for more than one year in British India, Dominion of India or India, as the case may be

It is Sri Bhalla's contention that he fulfils the requirements of this proviso

Sri Bhalla was appointed to the Indian Police in the year 1925 and he rose to the high office of Inspector General of Police, U. P., in January, 1944. This office he held until October, 1946. Prior to being appointed Inspector General of Police he had acted as the Provincial Transport Commissioner, as a Member of the Air Transport Licensing Board and as Director General, Civil Aviation India. After his retirement as Inspector General of Police Sri Bhalla was appointed a Member of the Uttar Pradesh Public Service Commission on appointment which he held from January, 1948 to January, 1949. His contention is that in the course of his duties in the various offices which he had held, he had from time to time to perform duties which were of a judicial nature; he, and properly, he used to have held judicial office within the meaning of clause (c) of the proviso to rule 1 and, as he had performed such

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Section 16(2) then provides that—

(2) When sections 8 to 14 come into force in respect of any High Court of Judicature established by Letters Patent, this Act shall have effect, in respect of such Court notwithstanding anything contained in such Letters Patent, and such Letters Patent shall, in so far as they are inconsistent with this Act or any rules made thereunder, be deemed to have been repealed.

The provision, therefore, is that the Bar Council has with the previous sanction of this Court made rules regulating the admission of persons to be Advocates of the Court, and we think it to be sufficiently clear that the proviso to section 9(1) of the Act, which reserves to the Court an undisturbed power to refuse admission to any person at its discretion, by implication shows that this Court can no longer admit as an Advocate a person who is not qualified for admission under the rules made under section 8.

Mr T. F. Shankar invited our attention to a passage at page 111 of the Report of the case of *Pranesh Chandra Gupta v. The Registrar, High Court of Judicature at Allahabad* (1) in which a Full Bench of this Court expressed the opinion that the Rules made by the Bar Council were merely directory. That case, however, was a *quære* rather than a real case. The question before the Court was whether in the absence of a Bar Council it was within the power of the High Court to enrol Advocates, the alternative then mentioned being the inability of the Registrar to comply with rules 4 and 5 of the Rules which required him to serve upon the Secretary of the Bar Council a copy of every application for enrolment, and which entitled the Bar Council to put in an objection to the enrolment. The Court pointed out that there is a distinction between the jurisdiction to enrol a candidate as an advocate and the procedure to be followed in making the enrolment, and we think that the Court's opinion that the rules were directory only had reference only to those rules regulating the procedure to be followed, particularly rules 4 and 5.

We were also referred to the decision of the Patna High Court in *M. Abdul Fawhood v. The Patna High Court Bar Council* (1). That was a case in which the High Court had decided that a retired officer of police should be enrolled as an Advocate of the Court. The High Court, however, acted under a particular rule of the rules framed by the Patna High Court Bar Council which specifically empowered the Court, in special cases and after consultation with the Bar Council, to exempt any candidate from all or any of the requirements of the rules. There is no similar provision to be found in the rules framed by the Bar Council of the Allahabad High Court.

We accordingly are of opinion that Sri T. P. Wadia, is not at present qualified for enrolment as an Advocate and we uphold the objection of the Bar Council.

Appellate reported

APPELLATE CIVIL.

Before Mr. Justice Gupta and Mr. Justice Dwarak.
BHO PRAYAG SINGH (Plaintiff)

1937
April 20

UTTAR PRADESH GOVERNMENT (Defendant)

Revenue—Claims and recovery of.—Plea of lack of power or title.
Jail—Jurisdiction of Civil Courts, whether barred—State
Pradesh Land Revenue Act 1930 s. 223(a).

The bar under s. 223(a) of the Land Revenue Act as to the jurisdiction of the Civil Courts, in matters connected with the claim or recovery of revenue or rent, made inalienable in such cases, has apply to cases of rent or revenue payable at present or by the Government or authority empowered.

Then Puri v. Secretary of State for India in Council (1),
Lado Gauda Dwarah Puri v. The Government of India (2) and
Pradip Kalia Ram Raj Kumar v. Crown of India (3) relied on.

First Appeal No. 134 of 1932, from a decree of
Magistrate, Lohi Civil Judge, Gwalior dated 4th April
1932 in Suit No. 84 of 1931.

11 A. I. R. 1937 Pat. 220

151 I. L. R. 1937 Cal. 237 (2)

12 A. I. R. 1937 Allah. 11

94 A. I. R. 1937 Pat. 500

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The basic answer is the well-known

Joshua Fried and C. B. Moore, for the appellants
The Standing Council, for the respondents

Gauru, J.—This is a first appeal from the judgments and decrees of Sri Jagannathan Lal, Civil Judge, Gorakhpur dated the 4th April 1952. By these judgments, the plaintiff has been dismissed upon the ground that it was barred by section 323(a) of the U. F. Land Revenue Act. The question of the bar of section 323(a) has been disposed of as a preliminary issue.

Before we deal with the contentions advanced before us it is necessary to refer to the plaint. The plaint alleged that the plaintiff was Kamtekar and an *Adhvani* but his statement was confined to looking after his Zamindari only, that there was one Sri Kahan Jagan Chaud, father of Sri Bhagwat Chaud, that the former took a contract of the Gorkhpat Bridge Ferry from the Public Works Department, Gorkhpat, for a period of three years beginning from the 15th of April 1946 to the 14th of April 1951 that the lease amount of the said contract was Rs 25,125 that Sri Kahan Suman Chaud died and his son Sri Bhagwat Chaud succeeded and carried on the contract taken by his father that due to various causes Sri Bhagwat Chaud suffered a heavy loss in the running of the ferry and he could not pay the dues of the Public Works Department relating to the contract regularly that, therefore, the District Magistrate took possession of the ferry from the said Sri Bhagwat Chaud in the month of January, 1951, i.e. before the expiry of the lease term that Sri Bhagwat Chaud was reduced to the plaintiff and he went to the plaintiff for legal advice and help and also requested the plaintiff to move the Public Works Department authorities, Gorkhpat, for remission in the contract money as there had been a loss owing to unforeseen circumstances, that the Public Works Department authorities were asserting that a sum of Rs 1,00,000 was due from Sri Bhagwat Chaud and had attached his property, that the plaintiff under the said Sri Bhagwat Chaud's instructions made an application to the Public Works Department authorities, Gorkhpat,

that the Superintending Engineer representing Bhagwan Chand's case and prayed on his behalf for a substantial remission; but the plaintiff's submission did not succeed that the Tahsildar of Sadar Tahsil, Gorakhpur, without any ground or reason called upon the plaintiff to pay the entire dues owing by Sri Bhagwan Chand to the Public Works Department; that the action of the Tahsildar in calling upon the plaintiff and asking him to pay the dues for which he was not at all liable, was not only ultra vires but was mala fide and illegal; that the plaintiff was never a lessee of the ferry in question and had nothing to do with it; that the process chosen by the Tahsildar as an agent of the defendant, for realising the arrears due was also unwarranted and without justification and the Tahsildar had no business to call the plaintiff and to threaten him with taking steps for realisation of the arrears amount absolutely in violation of law; that the plaintiff came to know that the Public Works Department authorities were annoyed with the plaintiff as he had represented the case of Sri Bhagwan Chand to the Superintending Engineer of the Public Works Department and as he had pointed out many irregularities committed by the said Department; that as the Public Works Department failed to realise the dues from Sri Bhagwan Chand, hence the local Public Works Department in collusion with Sri Bhagwan Chand wanted to treat the plaintiff as lessee and illegally realise the dues from the plaintiff; that so far as the plaintiff had been able to ascertain the total dues of the Public Works Department on the date of the suit after deducting the security money paid in compliance with the contract would not exceed Rs 78,000 and the claim made by the Tahsildar was, in any case, highly excessive and exaggerated; that the plaintiff gave a notice under section 111 of the Civil Procedure Code to the defendant on the 4th of May 1931, but no reply was given; that the cause of action for the suit had arisen on the 3rd of May 1931, when the Tahsildar of the Sadar Tahsil demanded Rs 1,08,614-9 from the plaintiff treating the latter as a contractor of the Banighat ferry in Gorakhpur and on the 6th of July 1931, the date of expiry of the notice.

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The plaintiff prayed for a permanent injunction against the defendant restraining the latter from using the Public Works Department claim of the Gouthpur Bhirghat ferry standing in the name of Sri Bhagwant Chand as evidence for the period from the 15th of April 1948 to the 14th April, 1951.

We have given heretofore previously the same point as it stands after the amendment, which was allowed by the trial court to be made in the plaint.

The Uttar Pradesh Government was the defendant impleaded in the suit and they filed a written statement pleading inter alia, that the plaintiff had deliberately not disclosed the true facts and had based his claim on totally wrong allegations. That as a matter of fact the plaintiff was the real Thikedar of the Bhirghat ferry in question which he had acquired bona fide originally in the name of his nephew, Sri Kashi Narain Chand and after his death in the name of the deceased's son, Sri Bhagwant Chand who, along with a third person named Ram Zwaar Kumar was admitted by the plaintiff into a partnership of the Bhirghat ferry business. That the plaintiff is a lawyer and resorted to the course of bona fide transactions by utilizing the names of his close relations at least only to avoid the formal appearance of his doing business, that he was the real Thikedar and was principally in charge of the whole business and actually carried it on in his own name along with his admitted partners all of whom were jointly and severally liable for the dues in respect of the Bhirghat ferry lease which were payable in arrears of land revenue under the Land Revenue Act and with section 8 of the Northern India Forest Act and therefore the suit was barred by section 133 (a) of the Land Revenue Act as it then stood because suit could not be presented in civil courts with respect to claims connected with or arising out of the collection of land revenue (observing that claims under section 133 (a) are barred of the prohibition contained in that section).

We may now reproduce the issues that were framed in the case:

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(1) Whether the suit is barred by section 234 (a) of the U. P. Land Revenue Act?

(2) Whether the suit is barred by section 23 (a) of the Specific Relief Act?

(3) Is the plaintiff the real owner of Badghat Ferry and was Sri. Kishan Surin Choud. a bona fide purchaser for the plaintiff? If so in effect?

(4) Was there any partnership between Sri. Bhagwan Choud. Ram Pannu Kishan and the plaintiff as alleged by the defendant? If so in effect?

(5) Whether the plaintiff has appropriated the benefits of the contract in question and is he liable for the dues in question on the ground?

(6) To what relief if any is the plaintiff entitled?

It appears from the record that it was at first agreed that the disposal of Issue no. 1 would determine going into facts also and that the whole suit should be tried at one and the same time, but later an application was made on behalf of the defendant that the legal Issue no. 1 be decided as a preliminary issue as it related to the jurisdiction of the court to entertain the suit. It is in consequence of this application that Issue no. 1 was treated as a preliminary issue and was disposed of.

The learned Judge of the Court below came to the conclusion that the suit was barred by section 234 (a) of the Land Revenue Act.

From the issues framed in the case, as quoted above, and the judgment of the court below, it will appear that no issue was framed on the allegations which had been made by the plaintiff that the claim in regard to the ferry dues was made *in bono* and without pretension. The importance of these two allegations does not seem to have been present in the mind of the court when the issues were framed and decision was given thereon and the matter was treated as if the bar of section 234 (a) of

Section 146 deals with process of seizure, while section 147 provides for a writ of *habeas corpus* and *certiorari* to appear. Because of the provisions of section 148 the deduction may be arrested and demand and under section 149 there may be an attachment and sale of movable property. There can be an attachment of land also under section 150. Then there are auxiliary provisions with which we are not concerned at the moment. Then we come to section 151 which runs as follows:

Whenever the proceedings are taken under this chapter against any person for the recovery of any similar estimate, he may pay the amount claimed under protest to the officer taking such proceedings, and upon such payment the proceedings shall be stayed and the person against whom such proceedings were taken can sue the Federal Government in the civil court for the amount so paid.

and in such case the plaintiff may notwithstanding anything contained in section 149, give credit to the amount (if any) which he alleges to be due from him.

No person under this section shall enable the person making the same to sue in the civil court, unless it is made at the time of payment in writing and signed by each person, or by an agent duly authorized to act on his behalf.

The only other section with which we are at present concerned is section 32B(1), which runs as follows:

No person shall initiate any suit or other proceeding in the civil court with respect to any of the following matters:

(4) claims connected with or arising out of the collection of revenues, (other than claims under section 181), or any points related on account of an award of revenue, or on account of any sum which is by this or any other Act payable to a revenue.

The other sub-clusters of this section are not relevant and they relate to other matters in which the exposure of the real owner is barred.

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The documentary evidence filed in this case has not been typed out for us and is not a part of the paper book but it was admitted that in this case there are three communications on the record which are said to be under section 9 of the Northern India Frontier Act and which are addressed by the Additional Collector and District Magistrate to the Tehsildar for taking action in regard to violations of the Bandhaat ferry lease dues against the persons named therein. We are not determining the legal effect of the aforesaid three communications. In the first of them, dated 22nd January, 1961, the persons from whom the recovery was to be made are Sri Bhagwan Choud, whereas in the second, dated 1st May 1961, the names given are (1) Sri Bhagwan Choud and (2) Sri Das Prayag Singh, the present plaintiff, in the third one, dated 25th July 1961, the persons from whom recovery is to be made are (1) Sri Bhagwan Choud, (2) Sri Das Prayag Singh and (3) Sri Ram Naray Kumar. A sum of Rs.1,08,818 is indicated in the first communication as being recoverable whereas in the latter two, the amount indicated as recoverable is Rs.1,08,818.9. It is because of the nature of these communications and the action of the Tehsildar with reference to them that the suit had been filed and the reliefs contained in the plaint have been sought for, the case of the plaintiff being that he is not even a lessee on the face of the lease. The nature of the court below is that there is only one way of questioning proceedings taken under Chapter VIII of the Land Revenue Act in a civil court and that is by having recourse to section 183 of the Act. Even and except that, there is still to be an absolute bar placed on the filing of a suit because of section 238 (a) of the Act. Inasmuch as proceedings were purported to be taken under Chapter VIII of the Land Revenue Act and the suit was clearly not one of the type provided in section 183, the court below held that it could not be entertained and dismissed it.

Two Full Bench cases were cited before the learned Judge in the court below and he has dealt with them

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that there was an exercise of power beyond jurisdiction and it was urged, therefore, that the case was not applicable.

Learned counsel for the appellants on the other hand, relied upon *Radhia Kishan v. case (1)* for the proposition that section 223 (m) of the Land Revenue Act should not be so interpreted as to exclude a suit, in a civil court filed by a party to prove his claim that the property proceeded against belonged to him and not to the defaulter against whom revenue might be due.

In reply, it was contended that in *Radhia Kishan's case (1)*, *Radhia Kishan* was not named as the defendant, but it was *Phool Chand* who was so named and further that the facts of *Radhia Kishan's case (1)* were that some property of *Phool Chand* was said to be in possession of *Radhia Kishan* and was being sought to be attached and sold as the property of *Phool Chand*. It was said that it was in those circumstances that *Radhia Kishan* brought the suit and the Full Bench held that his claim was not barred by section 223 (m). If the construction of law is all counsel for the appellants that merely because circumstances as stated above were raised by the Additional District Magistrate to the Tahsildar that would not amount to his being named as a defaulter in accordance with the provisions of the Act is correct then *Radhia Kishan's case (1)* might be attracted. We do not wish to express ourselves further in regard to these two cases which have been cited before us because we are sending back the case for a retrial after setting aside the judgment and we think that the question whether *Radhia Kishan's case (1)* or *Durga Ram's case (2)* would apply to the facts of the present case should be determined after the facts have been properly ascertained but we may point out that even in *Radhia Kishan's case (1)* the question has been considered as to whether a suit would lie on one who was an allegation of mala fides or if it had been alleged that the authorities had acted beyond jurisdiction.

We now come to consider whether if there is allegation of mala fides and an allegation that the authorities have

(1) A. I. R. 1951 All. 364.

(2) A. I. R. 1957 All. 412.

posed beyond jurisdiction in such circumstances a plain-
 off case or cannot file a civil suit or whether he is still
 debentured. It can doing so because of section 235 (a) of the
 Land Revenue Act and whether his estate is such a
 case is limited to the type of suit which can be filed under
 section 185 of the Land Revenue Act.

On the question of the right of suit despite a prior
 decree in the nature where mala fide are clearly alleged,
 we would like to refer to the case of *Tina Park v*
Secretary of State for India in Council (1). In that case
 it was recognised that had there been a change of
 mala fide, then despite the fact that the jurisdiction of
 the civil court had been ousted by the Sea Customs Act,
 1878, a suit could be entertained. Reference was made
 in that case to the judgment of Lord Justice, J., in
British Co Ltd v Collector of Madras (2). In that last
 mentioned case section 196 (2) of the Government of
 India Act was set up as a bar to the suit. The Court
 held that that section was a bar but pointed out that if
 there had been an allegation that the Secretary of State
 had used mala fide or had purposed to seek the protec-
 tion of the statute with the full knowledge that what was
 being done was to commit a wrongful act of aggression the
 suit would not be barred.

In *Lady Dwyer Devlin's Petition v The Dominions of*
India (3), which was cited before us, the plaintiffs had
 alleged mala fide and attacked certain orders made by
 the Collector of Bombay on the ground of these having
 been made for a collateral purpose. A statutory bar to
 the suit was pleaded but it was not availed because it was
 held that as the facts alleged and if those facts were
 proved it would not be a case of irregular exercise of
 power of jurisdiction but an exercise of power which
 the requesting authority did not possess.

In that case, there was also a discussion as to what
 are the requirements of pleadings when the challenge
 is on the ground of mala fide and it was stated that
 mala fide were a corruption of the mind and it was
 impossible to expect a party to give particulars of same.

(1) 1 L. R. 1919 I 126 (2) 32 (3) A. I. R. 1940 Mad. 171 176
 (4) A. I. R. 1955 Bom. 70

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have not been complied with, or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure

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Their Lordships expressed the opinion that in that case the jurisdiction of the civil court was excluded by the order of the Collector of Customs on appeal under section 188 and it was unnecessary to consider whether prior to taking such appeal under section 188 respondents would be entitled to resort to a civil court or whether they would be confined to a right of appeal under section 188. Therefore their view was that the jurisdiction of the civil court was, on the facts established and the statutory provisions applicable, excluded in the particular case and consequently they allowed the appeal and reversed the order of the Subordinate Judge but notwithstanding the observations of their Lordships of the Privy Council as quoted above would apply in an appropriate case which fell within the benefit of the rule laid down. This case of the Secretary of State for India v. Miani & Co. (1) has been followed at least in three cases of this Court, namely, Dr. Brij Behari Lal v. Emperor (2) Allahabad v. District Board of Pilibhar, (3) and District Board of Formalkabad v. Praga Datt (4).

In *Form Patta Ram Raj Kumar v. Deuts of India* (5) it has been laid down that

The exclusion of the jurisdiction of the civil courts is not to be readily inferred but must either be explicitly expressed or clearly implied. Even if jurisdiction is so excluded the civil courts have jurisdiction to quash such cases where the provisions of the Act have not been complied with, or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure.

The *Punjab* case mentioned above was a case under the Land Revenue Act. The Court further held that the Land Revenue Act expressly and implicitly bore

(1) 1 L. R. (1940) 244 248 (2) A. I. R. 1940 441 443

(3) A. I. R. 1940 441 443 (4) 1 L. R. (1940) 441 443

(5) A. I. R. 1940 441 443

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issues concerning the collection of land revenue where the property from which the land revenue is to be paid is (first) belonged to the defendant but there is no expense or implied bar of such a nature regarding property which, in fact, belonged to some body else.

When, therefore, in pursuance of a certificate under section 45(2), Income Tax Act, forwarded to him, the Collector attached the properties of a firm, which there upon brought a suit contesting the liability of the properties for attachment and sale on the ground that the assessee in respect of whom the certificate was issued was not a partner, it was held that the civil courts had jurisdiction to entertain the suit.

It seems to us upon a review of the cases mentioned above and other authorities, which we do not think it necessary now to mention, that if there is a clear allegation of lack of power or of *malâ fide* on the part of the tax authorities or of such a nature as to amount to a denial of the statutory provisions of exclusion of the jurisdiction of a civil court, would not bar such jurisdiction. We, therefore, feel that, in this case, we should and do hereby set aside the judgments and decrees of the court below and restore all findings given by that court and order that the case should go back to the civil court for disposal of all the issues, including the issue which has already been disposed of in the light of all the proved facts and circumstances as also the statutory and case law and our observations. We are of opinion that all the issues in the case should be answered by the court below after a full trial. We order accordingly.

In view of what we have said above, it would be necessary for the court below to decide two further issues, which we have framed as:—order that there may be no doubt in the minds of the parties as to the points wherein they are at issue. These issues are as follows:

(1) Whether the orders passed and the action taken by the authorities concerned against the plaintiff were *malâ fide*?

(2) Whether the orders passed and action taken by the authorities concerned were within and in accordance with the powers conferred by the relevant statutes?

We might add that parties were agreed that, in case we decided to send the case back to the trial court, all the issues should be disposed of by it itself. Parties are further agreed that fresh opportunity should be given to them for filing any documentary evidence that they desire. Since the oral evidence has not yet been recorded, it is not necessary to pass any orders in respect thereof. We order accordingly.

The appeal is therefore allowed, and disposed of in terms of the above order. The trial court shall now proceed to dispose of the suit in accordance with law and the directions given herein before. Costs here and hereafter will abide the result.

Appeal allowed.

APPELLATE CIVIL

Before Mr. Justice Gupta and Mr. Justice Dasgupta
THE BHARAT VEGETABLE PRODUCTS
LIMITED AND OTHERS (Defendants)

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RAM DAS AND ANOTHER (Plaintiffs)

Admission. Agreement—first in respect of matter raised by—
Application for stay of—Discontinued application for
adjustment and application for setting aside an order under
whether steps in suit—Admission Act, 1906 s. 54

Produce an application for adjustment filed by a Plaintiff without authority and dismissed in such suit an application praying for and seeking the setting aside of an order for proceeding with the suit as party can be said to be a step in the proceeding so as to deprive the applicant of the benefit of s. 54 of the Admissions Act has the stay of the suit relating to a matter agreed upon by the parties to be decided through arbitration.

Chand Singh and Son v. Mathilal Singh Mahto Singh (1)
decided. Law v. Hume (2) relied on.

First Appeal from Order No. 128 of 1934 from an order of Raja Ram Bhatia, Civil Judge of Bareilly, dated the 24th April, 1934.

The facts appear in the judgment.

(1) A. I. R. 1932 Nag 129. (2) 1903y P. A. B. R. 125 126.

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The judgment of the Court was delivered by

Defense. —The defendant appellants filed the appeal against the order of the trial court refusing to stay further proceedings in the application for permits not to run as a passenger motor vehicle under section 34 of the Indian Motorization Act 1948. The circumstances, which have given rise to this appeal, are as follows:

The plaintiff respondents filed an application for per mission to sue as pauper on the 2nd of November, 1953. The relief claimed in the application was that a decree for Rs 18,215 should be awarded to the plaintiffs against the defendants. Notices of the application for permission to sue as a pauper were served to the defendants requiring them to file objections against the application. On 18th January 1954, Sri Madan Mohan Bhargava, Valid filed an application praying for time to file objections. A telegram from the defendants was also attached along with the application. The telegram requested the learned Valid to apply for adjournment in the court. The application was, however, filed with out a Vakalatnama from the defendants, and since the application was not properly presented, the trial court refused to adjourn the case and passed an order that the case should proceed ex parte against the defendants. On 22nd February, 1954, the defendants filed an application supported by an affidavit praying for the setting aside of the ex parte order and filing of an objection to the application for permission to sue as a pauper.

The trial was set aside for ex parte order on that date and fixed the 25th of March 1994, for filing an objection by the defendants. On 25th March, 1994, the defendants filed an objection under section 24 of the Indian Arbitration Act. It was stated in that application that the plaintiffs and the defendants had entered into an agreement in respect of the subject matter of the present application and clause 25 of that agreement required the parties to settle their dispute by arbitration. It was said that since the dispute in the case arose out

of the aforesaid agreement, the court could not proceed with the matter because the defendants were always ready and willing to submit the dispute to arbitration and section 34 of the aforesaid Act in such circumstances required that the court should stay further proceedings until the dispute was decided by the arbitrators.

Two objections were raised on behalf of the plaintiffs to the defendants' application under section 34 of the Indian Arbitration Act. The first objection was that the plaintiffs have already challenged the validity of the aforesaid agreement under section 33 of the said Act and that question was still under consideration of the court in a separate proceeding. The trial court accepted this objection, but it has not been pressed before us by learned counsel for the plaintiffs, and it will be deemed that the point has been given up in the appeal.

The second objection to the defendants' application was that since the defendants had already taken steps in the proceedings under section 34 of the Indian Arbitration Act, this was not applicable to the case and the court could not stay further proceedings. It was said that on the 24th of January, 1954, an application for adjourning the case was made by Sri Madan Mohan Bhattacharya, Valid of the defendants. But that application was filed by Sri Madan Mohan Bhattacharya without any Validation or any other authority from the defendants. The true legal position on that date therefore was that Sri Madan Mohan Bhattacharya had no power or authority to present the application and the said application was accordingly not an application on behalf of the defendants in the eye of law. The defendants cannot be held to have taken any steps in the proceeding on account of the mere fact that Sri Madan Mohan Bhattacharya had made that application on 24th January, 1954. Indeed, the trial court did not consider that application at all and rejected it as defective and incompetent.

It was then submitted that the defendants moved on the 26th of February, 1954, an application supported by an affidavit for the setting aside of the *ex parte* order,

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dated the 30th of January 1954 and for the filing of an objection to the proper application and thereby took steps in the proceedings. The trial court accepted the submission and dismissed the defendants' objection under section 34 of the Indian Arbitration Act.

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We have carefully perused the application and the affidavit dated the 26th of February 1954, and we are of opinion that the defendants, by moving that application cannot be said to have taken a step in the proceedings. As already stated, on 30th January 1954 the trial court had passed an order that the case would proceed ex parte against the defendants and the defendants could not possibly take any part in further proceedings until the ex parte order was set aside. The defendants were in the circumstances, obliged to apply to the court for the setting aside of the ex parte order, and their application dated the 26th February, 1954 contained the following prayer:

It is therefore respectfully prayed that the ex parte order dated 30th January 1954 be set aside and the defendants be given opportunity to file objections and contest the application and for this the defendants shall ever pray.

The trial court set aside the ex parte order as passed and fixed the 26th of March 1954 for the filing of an objection and so that that the defendants filed an objection under section 34 of the Indian Arbitration Act for stay of proceedings. No other step was taken by the defendants in the proceedings and it seems to us that their real intention in making the application dated 26th February 1954 was to remove the impediment of the ex parte order from their way and then to file an objection under section 34 of the Indian Arbitration Act.

The words "the defendants be given opportunity to file objections and contest the application" in the prayer in that application should, in the circumstances mentioned above, be construed as referring to an objection and a contest under section 34 of the Indian Arbitration Act. It may be contended that these words

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as *ex parte* order, the defendants had taken any other step on the part besides the step of asking the court to vary proceedings because of the arbitration clause in the agreement then no doubt they could not avail of the benefit of section 34 of the Indian Arbitration Act. But the defendants had not taken any step except the application for setting aside the *ex parte* order and, therefore, it was held that the defendants could get the benefit of section 34 of the Indian Arbitration Act.

In the case before us also defendants did not take any intermediate step between the date of the setting aside of the *ex parte* order and the making of the application under section 34 of the Indian Arbitration Act. The observations of Dr. PATEL, L. J., in *Lane v. Morgan* (1), would also adversely lend support to the view we are taking in this case.

We may also mention here that learned counsel for the defendants addressed an argument to us that at the time when the defendants had applied for the setting aside of the *ex parte* order, the application so far as paper was under consideration and no suit was then pending before the trial court, so that it could not be said that the defendants had taken a step in a proceeding in respect of any matter agreed to be referred to arbitration. Since it has been possible for us to dispose of the case on a narrower ground we have not considered it proper to express any opinion on this question.

We accordingly allow this appeal and set aside the order of the trial court and further direct that the trial court will now proceed to pass an appropriate order under section 34 of the Indian Arbitration Act having regard to the observations made by us as well as other circumstances which may be placed before it for consideration. The plaintiffs shall pay the costs of this appeal to the defendants.

Let the record of the case be sent down to the court below as early as possible.

Appeal allowed

(1) [1959] 1 A. B. R. 101, 102.

APPELLATE CIVIL

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Before Mr. Justice Ganga and Mr. Justice Dwaraka

U P GOVERNMENT (Defendants)

v

NANHOO MAL GUPTA (Plaintiff)

Agreement to lease.—In contemplation of expiry of existing lease—tenant demands wrongful refusal to execute—Agreement to deliver copies from a continuous supply of 100—Continued issue of lease—Not regularly stated but substantially effective—Agreement whether had for uncertainty—Indian Contract Act, 1872 at 28 and 29

An agreement for lease on the expiration or before of both the parties that the sitting tenants would vacate the premises after the expiry of their term cannot in case of their wrongful refusal to vacate be said to be based on a continuous supply of (a) as to be rendered void by s. 28 of the Contract Act.

A lease for a term the commencement of which is not expressly ascertained has a continuous supply from the rents as has been in other circumstances cannot be said to confer from uncertainty as to be void under s. 28 of the Contract Act.

Wheeler v. Wheeler (1) and *Swadell v. Franklin* (2) relied on.

(B) **Agreement to lease.**—Further and when comparatively negotiable—Effect of non registration—Indian Registration Act, 1908, ss. 17(1) 17(1) (a) and 49

S. 17(1)(a) read with s. 17(1) of the Registration Act, makes a lease in land an agreement in a lease of immovable property from year to year or for a term exceeding one year cannot orally negotiable. The registration agreement to lease how ever creates only such agreements to create a power thereof.

Where a document from all the essential terms of a lease and would be effective without the necessity or omission of whether or whether agreement or document to be executed at future it creates a present demand notwithstanding the fact that it is to take effect on conditions ascertainable at a future date. Such a document, if unregistered is neither void nor enforceable in evidence.

Trivedi v. Shri Ram Lal (3) and *Chapman v. Tower* (4) applied.

(C) **Contracts by the Crown or a State.**—How to be executed and enforced—Non compliance with requisite forms, effect of Government of India Act, 1931 [28] Gov. P. Ch. (7) s. 178 (1)—*Commissioners of Police Act* 1891(7)

(1) 10 L. J. 34 (1) 344

(2) 1854 L. R. N. C. P. 27

(3) A. I. & 1931 S. C. 425

(4) 1869 L. R. N. W. 108

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The constitutional requirement is that all contracts by the Union or a State shall be expressed to be made by the President or the Governor as the case may be. A contract which does not conform to the prescribed form, though not void is voidable, and against the Government action of disallowing to stand may be taken by a

English v. State of U. P. (2), *Chandrabhai Fakhadar v. Government of Madras* (2), *Theruvada Narayana v. Union of India* (2) and *Gopal Singh Prasad v. State of India* (2) cited as

(2). Just as contract against Government-Nagar for-Shop-Digression as to constitutionality of contract whether and when may be raised for the first time in High Court-Codes of Civil Procedure 1908 O. XXI r. 3 s. 10

An objection on a point of law which does not involve or depend on question of fact may be allowed to be raised for the first time at the stage of argument on appeal before the High Court.

The objection to the constitutionality of a contract subject to the plea or fact of compliance cannot, therefore, be allowed to be raised for the first time on appeal unless the plea is one which is available to the other party at the instance where there is no ground as the Government under s. 10 of the Code of Civil Procedure which is already stated and from the scope of the prospective case—does not depend or rely on fact-finding.

McKenney v. The Secretary of State for India (2), *Pranaya v. Secretary R. R. Punjab* (2), *Kandiah Lethibhai Patel v. Lathika Thiruppal Nallaiah* (2) and *Ramprasad Bhatia v. State of Madras* (2) cited as

Ramprasad Bhatia v. State of Madras (2) cited as

First Appeal No. 314 of 1944. From a decree of J. K. Das, Civil and Sessions Judge, Raipur, dated 26th April 1944 in Suit No. 79 of 1943.

The facts appear in the judgment.

Brij Lal Gupta for the appellants.

Arindam Prasad, S. S. Chandra Prasad and P. K. Berman for the respondents.

The judgments of the Court was delivered by—

JUDGMENT. —The U. P. Government, the defendant appeals. The dispute in this case relates to four plots

(1) A. I. R. 1954 40 302

(2) A. I. R. 1954 3 C 402

(3) 1954 1 L. R. 14, Cal. 797

(4) A. I. R. 1954 3 C 144

(1) A. I. R. 1954 3 C 326

(2) A. I. R. 1954 Cal. 207

(3) A. I. R. 1954 Mad. 104

(4) A. I. R. 1954 Cal. 80

(5) A. I. R. 1954 3 C 194

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of land situate in the city of Kanpur. These are now
referred to in Schedule A to the written statement filed on
behalf of the defendant. Matters are held on these
plots. The plaintiff filed a suit against the defendant
for damages for a breach of an agreement to let out
these plots to him. The allegations in the plaint were
that in August 1944 the Executive Engineer, Kanpur
Division (Lovers Ganga Canal) who was in charge of
the management of the stormwater plots, offered offers for
the grant of a lease of the stormwater plots, that the plaintiff
offered being the highest, was accepted by the Executive
Engineer, Kanpur Division (on behalf of the defendant)
that it was agreed between the plaintiff and the Execu-
tive Engineer that the plaintiff would be granted
the lease of the stormwater plots for a period of five years,
that the plaintiff was asked to deposit Rs 5,000 as six
months rent in advance that the plaintiff accordingly
deposited Rs 5,000 on the 23rd August 1944 and Rs 150
on the 6th September 1944 that on the 23rd August
1944 the plaintiff and the Executive Engineer signed
certain documents which according to the plaintiff,
were agreements in lease, and that the plaintiff was
assured that he would be let in possession over the storm-
water plots as soon as the necessary arrangements were
in any case on the 1st April 1945 when the term of
these leases was to expire. The Executive Engineer,
however, did not deliver possession of the stormwater plots
in spite of repeated requests of the plaintiff. On the
23rd February 1945 the plaintiff was informed by Mr
B. D. Goyal, the then Executive Engineer, that the
plaintiff's deposit money of Rs 5,150 was being returned
to him because it was not possible to deliver possession
of the stormwater lands to him. After some immediate
correspondence the plaintiff agreed on the 15th/23rd
June 1945 a notice under section 80 of the Code of
Civil Procedure on the defendant through the Collector,
Kanpur. It was pointed out in the notice that if the
Government failed to honour the contract and deliver
possession of the stormwater plots to the plaintiff the plain-
tiff would institute a suit in the appropriate civil court
for the specific performance of the contract or for re-
covery of damages. The defendant failed to deliver

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possession of the aforesaid lands to the plaintiff and hence the suit. The plaintiff claimed Rs 15,508 as damages for breach of contract.

In the written statement filed on behalf of the defendant it is admitted that Sri Shyama Lal, Executive Engineer, accepted the offer of the plaintiff and agreed to give him a lease of the aforesaid plots for a period of five years. It was however, alleged that the plaintiff had executed four leases in respect of the aforesaid plots on the 26th August 1944 but the plaintiff did not get them registered as required by law. The leases were accordingly void and unenforceable against the defendant. It was further alleged that the leases were void for mutual mistake of fact. It was also stated that the Executive Engineer had no authority to grant the leases. No sanction was obtained from proper authority by the Executive Engineer and the leases were not executed in accordance with legal procedure. Lastly, it was alleged that the plaintiff was not entitled to any damages and, at any rate, the damages claimed were very excessive.

The evidence consists of some documents and the oral statements of the plaintiff and one Deep Chand on behalf of the defendant. We shall deal with the evidence at the appropriate stage hereafter.

The trial court repelled all the pleas of the defendant and held that it was liable to pay a sum of Rs 15,508 as damages to the plaintiff for the non performance of the agreement to lease the aforesaid plots. It has further directed that if during the period of five years during which time the leases of the plaintiff would have remained in force plots nos 1 and 2 would be required and returned by the defendant for its own use, the defendant would be entitled to claim a refund of the proportionate amount of damages which had been allowed to the plaintiff. As already stated, the defendant appeals against the judgments and decrees of the trial court.

The plaintiff has filed a cross objection against that part of the decree which entitles the defendant to claim a refund of the proportionate amount of damages in a certain contingency. It may be stated here that framed

cannot for the plaintiff has not pressed his case objection during the hearing of the appeal so that nothing need be said in our judgment about the merits of the cross-objection.

The memorandum of appeal filed on behalf of the defendant covers a very wide area. Learned Justice Sanding Counsel has, however, confined his challenge to the doctrine of the trial court to only four grounds. They are

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(1) The four leases which were executed on the 26th August, 1944, are void under section 28 of the Indian Contract Act on account of mutual mistake of fact.

(2) The said leases do not specify the date from which their term would commence and are therefore void for uncertainty.

(3) The term of the said leases is a period of five years and since the plaintiff did not get them registered no liability can be fastened upon the defendant on the strength of these leases.

(4) No damages could be granted to the plaintiff.

Since learned counsel for the defendant has not pressed the other grounds mentioned in the memorandum of appeal it will not be necessary for us to deal with them and we shall now proceed to examine the above said four grounds in their serial order.

The plea regarding mutual mistake of fact was taken in paragraphs 4 and 17 of the defendant's written statement. It was said there that the leases were executed under a mutual mistake of the parties that possession of the plot in dispute would be given immediately or in 15 days by executing the sitting tenants. Since the sitting tenants refused to vacate it became impossible for the defendant to perform its part of the contract. Learned Justice Sanding Counsel has raised our attention to the application (No F) of the plaintiff dated the 23rd August, 1944. By this application the plaintiff requested in the Executive Engineer that he had come to know that the terms of the lease of the aforesaid plot in favour of the sitting tenants had

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accepted and that he was, therefore, making an offer to accept leases on enhanced rates of rent. The application ended with the request that his offer, being a unilateral offer, should be accepted. On the basis of that application the Executive Engineer passed an order on the 25th August, 1944, in these terms:

As this is 50 per cent increase over present rates, hence sanctioned from the date of giving over possession to him.

It is argued that if the application and the order of the Executive Engineer are read together it would appear that the leases were granted to the plaintiff on the assumption that the sitting tenants would vacate the land. Notices were issued to the sitting tenants by the Executive Engineer on the 25th August, 1944, to vacate the disputed plots within 15 days. But the sitting tenants did not vacate the plots and, in spite of his best efforts, the Executive Engineer could not deliver possession of the disputed plots to the plaintiff on account of the unwillingness of the sitting tenants to vacate the plots. It was urged that the aforesaid documents clearly revealed that the contracting parties had wrongly assumed that the sitting tenants would vacate the plots when required by the Executive Engineer to do so. The erroneous assumption of the parties amounted to a mutual mistake of fact and the leases were, therefore, void under section 23 of the Indian Contract Act.

Before examining the merits of the arguments of learned Junior Standing Counsel on this point we would like to point out that the written statement has misstated the nature of the question at issue. Mistake as to the formation of contracts may be of three kinds, namely unilateral mistake, mutual mistake and common mistake. In a case of unilateral mistake only one of the contracting parties is mistaken and the other knows of his mistake. Its consequence is that the contract is void. In a case of mutual mistake the contracting parties misunderstood each other and there is no real correspondence of offer and acceptance. The parties are really not conscious of what they are doing and there is in fact no agreement at all. In this case also the contract

is void. In a case of common mistake both the contracting parties make the same mistake. The minds of the contracting parties are ad idem and there comes into being an agreement, but it is devoid of force and effect because both the parties are mistaken about some fact which is vital to the agreement. Section 28 of the Indian Contract Act deals with the common mistake of fact and not mutual mistake of fact. The facts averred in paragraphs 4 and 17 of the written statement clearly suggest that the expression, mutual mistake, has wrongly been used for common mistake. We would accordingly proceed on the basis that we are called upon to decide whether the agreement in the instant case was void on account of a common mistake of fact committed by the contracting parties at the time of the formation of the contract.

At the time of the formation of the contract the subject matter of the contract was in existence. The plots in dispute were there and the lease of the sitting tenant were to expire on the 31st March, 1945. One of the covenants in the lease of the sitting tenant was that they would vacate the plots within 15 days from the date of the receipt of a notice from the lessor that they should hand over possession of the plots to the lessor. The plaintiff and the Executive Engineer were aware of this covenant and both of them expected that the sitting tenant would honour the covenant and vacate the plots when they were called upon to do so by the Executive Engineer. So far it cannot be said that the parties were negotiating under a common error as to an essential fact. The path and substance of the defendant's grievance really is that the sitting tenant belied the expectation of the contracting parties that they would vacate the plots in conformity with the covenant, as their lease. But a contract is not necessarily void because subsequent events have disappointed the expectations of the parties in which it was made. Section 28 does not apply to a case where the contracting parties have made no mistake as to any fact existing at the time of the making of the contract and it is complained that one of them is unable to carry out its part of the contract on account of the

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unimported refusal of a third person to carry out his obligation under another agreement. The first contention of learned Junior Standing Counsel, therefore, fails.

The same argument of learned Junior Standing Counsel is that four leases, in the instant case do not specify the dates from which they would commence. The leases are therefore void for uncertainty. The four leases are marked Nos. F, G, H and I. In all these leases it is expressly stated that they were to run for a period of five years from 1944 to 1949, but the spaces where the date of the commencement of the lease should have been mentioned is left blank. It is no doubt true that section 33 of the Indian Evidence Act forbids the filling in of blanks in a deed with the aid of extrinsic evidence, but it does not affect the courts power to fill in blanks and mistakes by the ordinary rules of construction of deeds. We would therefore, examine the documents marked Nos. F, G, H and I for the purpose of ascertaining whether the date of the commencement of the leases had been settled definitely between the plaintiff and the defendant. At the very beginning of these documents the term and the rate of the tenancy have been stated plainly. It is then recited that, and how the rent would be paid to the lessee. There is a clear stipulation between the parties that the plaintiff would pay six monthly rent in advance at the office of the Revenue Engineer or to any such officer as is named noted by him for that purpose. Then it is provided that the first instalment of rent would be paid on 25th August, 1944. When the term and the rate of the tenancy were determined, and the rent was made payable in advance half yearly, the payments commencing from 25th August, 1944, it appears to us that the term commenced on the same date. Rent may be paid in advance or when it has become due, but as a rule a person would not agree to pay any sum as rent until the lease has actually commenced to run in course. The agreed term that the rent should be paid on 25th August, 1944, would, therefore, support that the term of the lease started

ing was from that date, and the documents alleged can not be said to be uncertain and unperfected. In *Windsor v. Walker*, 11, the defendant was the owner of a piece of land. On 16th February, 1857 he signed in favour of the plaintiff a memorandum to the effect that he would let the land for a term of 99 years at 24*l.* yearly rent which would be payable quarterly commencing on 15th March next. The plaintiff was, by specific performance of the agreement was refused by the defendant on the ground that the agreement was uncertain because the commencement of the term was not fixed on the face of it. *Fur. J.* while rejecting the submission observed:

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But the term for 99 years is accompanied by rent which is clearly payable quarterly during the term, which rent commences on 15th March 1857, and it appears to me therefore that the term commences at the same period.

The decision in *Sawhill v. Fawcett* (2) is also to the same effect and supports our conclusion. The signed agreement of Leased Junior Standing Counsel, these facts, the fact

Leased Junior Standing Counsel then concluded that the lease was for a period of more than one year. A lease for a period of more than one year can be made good by a registered instrument only. Since the leases in question were not registered, they were enforceable against the defendant, and the plaintiff's suit for damages was, therefore, liable to be dismissed.

The trial court has held that the documents Nos. F, G, H and I were neither leases, nor agreements to lease within the meaning of that term in the Indian Registration Act. The real documents in the opinion of the trial court, namely evidenced an agreement whereby the plaintiff and the Engineer had stipulated that the latter would execute a lease at some future date in favour of the plaintiff in respect of the disputed plots. The trial court, therefore, held that the said documents did not require registration.

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Learned counsel for the plaintiff has submitted before us the argument that the aforesaid documents evidenced neither a lease, nor an agreement to lease as defined by the Indian Registration Act. They are merely agreements whereby the Executive Engineer bound himself to let out the disputed plots to the plaintiff by executing proper leases at some future date. A lease is a present and immediate transfer of lessor's rights in the demised property to the lessee. Section 2 (7) of the Indian Registration Act provides that a lease includes an agreement to lease. Section 17 (1) (d) of the Indian Registration Act requires that a lease as well as an agreement to lease should be registered. In the case of *Taramahal v. Bai Lalabai* (1) their Lordships of the Supreme Court have held that an agreement to lease is a document which creates a present demise. In other words an agreement between the two parties, which creates one of them, namely to claim the execution of a lease from the other without affecting a present and immediate demise in his favour, is not an agreement to lease, and such an agreement would therefore not require registration under the Indian Registration Act. We will therefore have to see whether the documents, Nos. F, G, H and I effected a present and immediate demise of lessor's rights in favour of the plaintiff, or they merely enabled the plaintiff to claim the execution of leases from the Executive Engineer without affecting an actual demise in his favour.

All the four documents are headed as 'lease'. They are signed by the plaintiff and Sri Shyam Lal, the then Executive Engineer. In the preamble of all the documents it is categorically stated that the plaintiff has acquired a plot of land for the period beginning from 1944 and ending with 1949 at the rate of Rs.21 per month on the conditions specified in the deed. The word 'acquired', in our view, is indicative of the fact that the documents effected an actual demise in favour of the plaintiff. Condition (17) of the documents (H, F) recites that it was agreed that if any tax of any sort were imposed on the aforesaid land, which has been

given or rent, the lease would be liable for the payment of such tax. The words which has been given on some signs indicate that the documents effected a present and immediate transfer of lessor's rights in favour of the plaintiff. Conclusion (34) in the documents Nos. G and H declared that the lease which had been executed under any circumstances prior to the execution of these documents would be deemed to be annulled and annulled. Conclusion (31) also shows that these documents effected a present and immediate transfer of lessor's rights in favour of the plaintiff for otherwise it would not have been necessary to make the declaration that the lease existing in the year of the present of these documents would be annulled or cancelled. These lease were to expire on the 11th March 1945. If the intention of the plaintiff and the Executive Engineer were that the plaintiff was being given a right to get lease executed at some future date it would not have been necessary to make the declaration that the existing lease would be deemed to have been annulled or cancelled. Such a declaration was necessary only because the parties intended to effect a present and immediate transfer in favour of the plaintiff. Further, the documents in question have also fixed all the material terms of a lease. They have fixed the rent and the mode of its payment. They have fixed the duration of the lease and they have also further fixed the covenants regulating the relationship of lessor and lessee.

It was held in the case of *Chapman v. Fowler* (1) that if a document has fixed all the essential terms of a lease it should be construed as a lease. The mere fact that the plaintiff was not actually put in possession on or after the execution of these documents would not affect their essential character. Where the property, which is the subject matter of demise is in possession of a sitting tenant or a trespasser, undoubtedly possession can not be immediately taken over by the prospective lessee but the lease would nevertheless be a lease if the essential terms of the document intended to effect a present and immediate transfer of lessor's rights.

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144 We are therefore of opinion that the documents in question evidenced a lease in favour of the plaintiff and were consequently compulsorily registrable. Since these documents are unregistered they are incapable of creating any right in favour of the plaintiff and they do not bind the defendant. The defendant cannot be made liable for breach of any term of these leases. These documents are also inadmissible in evidence as evidence of breach of section 42 of the Indian Registration Act, because they are not registered instruments.

Learned counsel for the plaintiff, however, contends that he can fall back upon the agreement which may be implied out of the application of the plaintiff dated the 22nd August 1944 and the order of the Executive Engineer passed thereupon, on the 26th August 1944. He says that the said application and the order made out an independent agreement whereby the Executive Engineer bound himself to grant a lease in favour of the plaintiff at some future date and hand over possession of the disputed property whenever the same became vested in . . . The application of the plaintiff dated the 22nd August 1944 makes an offer to the Executive Engineer that the plaintiff would accept lease for the disputed property at a specified rate of rent. The order of the Executive Engineer dated the 26th August 1944 records an acceptance of the plaintiff's aforesaid offer. The offer and acceptance of the promise would constitute an agreement under the Indian Contract Act and we think that the plaintiff would be entitled to damages for breach of that agreement if it could be held that the agreement was enforceable against the defendant.

We may also state here that even if the documents Nos. F. G. H. and I were held to be non-registrable documents, the defendant can be liable with the habeas for damages upon their strength only if it could be held that those documents evidenced an agreement which was enforceable against the defendant. All these documents arose in their possibility that the plaintiff had acquired the disputed property from Ala Mapeya, the King Rupaia of India through the Executive Engineer. So far as the order of the Executive Engineer dated the

observed by him that a contract executed on behalf of the Government of the Province should not only be executed on behalf of the Government of the Province but also in his name. The agreement in that case did not purport to have been made in the name of the Government of U. P. and it was held that it was not a binding agreement.

Section 173 (3) *mirrored* corresponds with Article 259 (1) of the Constitution. In the case of Chaudhary Parkashji v. Mohanlal Pandey⁽¹⁾ the contracts were not supposed to be made by the President of India as required by Article 259 (1) and it was argued that they were therefore void. Disputing with this contention Bench J. was pleased to observe as follows:

It may be that Government will not be bound by the contract. But that is a very different thing from saying that the contracts as such are void and of no effect. It only means that the principal cannot be sued, but we take it there would be nothing to prevent ratification, especially if that was for the benefit of Government.

The following deductions can be made from this decision: firstly contracts which are not supposed to be made in the name of the President or the Government are not void; usually such contracts are not enforceable against the Union or the State Government, and, chiefly, they would become enforceable against the Union or the State Government if they are ratified by them.

In the case of *Viswanath Narayan v. Union of India* (2) the contract in question was executed by the Additional Chief Engineer and not by the Executive Engineer. It seems that the Additional Chief Engineer was not authorised to enter into an agreement on behalf of the Government, and it was observed by the Supreme Court that Government can only be bound by contracts which are entered into in a particular way and which are signed by proper authority. The Calcutta High Court has also adopted a similar view, *see Ghosh Singh Sanyal Ltd. v. Union of India* (3).

(1) A. I. R. 1959 J. C. 446.

(2) A. I. R. 1953 J. C. 409.

(3) A. I. R. 1959 Cal. 225.

All the above-mentioned cases clearly show that if a contract is not expressed to be made in the name of the Government of Prossure it will not be enforceable against the Government of that Province. We have already seen that in the present case the documents Nos P. G. H and I and the order of the Executive Engineer dated the 25th August 1894 (as set on their face supposed) to be made in the name of the Government of the United Provinces. Consequently these documents and the order of the Executive Engineer do not make out an agreement binding on and enforceable against the defendants. The order of the Executive Engineer may also be void for uncertainty but we do not express any final opinion thereon.

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Learned counsel for the plaintiff respondent at this stage pointed out that the defect in the form of documents which we have already discussed above was not pleaded in the written statement nor was it taken at any stage in the trial court. He also points out that the memorandum of appeal does not contain any ground to the effect that the documents aforesaid do not make out an enforceable contract. The defendants should not therefore be permitted to raise this objection at this late stage. If the defendants were permitted to raise this objection at this stage it would cause serious prejudice to the plaintiff, inasmuch as he would be deprived of an opportunity of proving that the agreements in question were ratified by the Government. He says that in the circumstances the objection regarding the enforceability of the agreement is not a pure question of law but is a mixed question of law and fact and should not be permitted to be raised at the stage of arguments in appeal. We are not inclined to accept this line of argument of learned counsel for the plaintiff.

We have no hesitation in saying that if the contracting parties in the present case were two individuals, it would not have been just and proper for the Court to permit the defendant to object for the first time at the stage of arguments in appeal that the said contract was not enforceable against him, because in that case the plaintiff would not be able to plead ratification of the

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- presented by the defendant. Reversal is essentially a question of fact and the plaintiff would adduce no evidence to prove reversal if the defendant had not questioned the enforceability of the contract at the proper stage. If the defendant is permitted to object to the enforceability of contract at the stage of argument on appeal for the first time, there is no doubt that it would cause serious prejudice to the plaintiff. Courts have therefore, generally held that parties on appeal should not be permitted to raise objections which are not pure questions of law and which require further investigation of facts, if such objections have not already been taken at the trial stage at the proper time. But the position in this case is fundamentally different on account of the fact that the defendant is not a private individual but the U. P. Government. A person may file a suit against a private individual whenever he likes. But a suit against the Government can be filed only after a notice under section 86 of the Code of Civil Procedure has been served upon the Government. It is now well settled that the provisions of section 86 of the Code of Civil Procedure are mandatory and they must be strictly complied with. One of the requirements of this section is that the notice, which is served upon the Government, should state the cause of action for the intended suit. If a suit is maintained against the Government on the strength of a notice, which does not state the cause of action, the suit would be liable to be dismissed. Similarly, if the suit is maintained against the Government on the basis of a cause of action which is different from the cause of action stated in the notice, it would also be liable to be dismissed. The object underlying the section is to give a clear and certain cause of the claim to the Government so that, if it is so advised, it may settle the claim and avoid the impending threat of a suit and consequential cost of the suit in the event of the claim being decreed and it has, therefore, been held that it was not permissible for a notice to maintain a suit upon the basis of a cause of action which has not been stated in the notice, or which is substantially different from the cause of action stated in the notice.

In the case of *Mr Perry v. The Secretary of State for India* (1) a suit was instituted against the Secretary of State for India for damages for negligence. The notice served upon the Secretary of State for India, under sec. 80 of the Code of Civil Procedure had stated that he was liable to be sued for damages for negligence. The suit was dismissed whereupon the plaintiff filed an appeal. In the course of the hearing of the appeal it appeared to the plaintiff that he could not succeed on the basis of negligence and, therefore, he made an application for the amendment of his plaint. The point was that he should be permitted to change the cause of action from negligence to nuisance. The application for amendment was not allowed on the ground that the notice under section 80 had not stated that the cause of action for the claim was founded on nuisance and it was said that the amendment sought to introduce a cause of action which was not mentioned in the notice. *James, C. J.*, while dismissing the application for amendment thus observed:

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The plaint is now proposed by way of amended plaint differs to an essential degree from the original plaint. The original plaint proceeded upon negligence, whereas the new plaint proceeds upon nuisance on the basis of obstruction on the highway so that it is impossible to say that the cause of action is the same. That brings in the plaintiff's way the difficulty created by section 80 of the Code.

The notice which was served as a preliminary to the plaint as originally framed pointed to a suit based on negligence and it stated a cause of action different from that on which the plaintiff would rely in his proposed plaint. It follows, therefore, that it is not open to us to give the plaintiff permission to amend his plaint.

In the case of *Procureur of Madras v. R. B. Poddar*, (2) a suit was instituted against the Provincial Government of Madras. The plaintiff, in the course of trial waived its amended plaint by adding a new paragraph to it. That amendment was allowed by the trial court,
(1) (1913) 1 L. R. 38 Cal. 387. (2) A. I. R. 1949 Mad 194.

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and shewage the Provincial Government went up on stream to the High Court and prayed that the order of the trial court allowing the amendment should be set aside, because the amendment introduced a new cause of action which had not been stated in the notice under section 88 of the Code of Civil Procedure. The suit as originally framed, was for a declaration that the acquisition by the Government of certain property belonging to the plaintiff was illegal, null and void, voidable ultra vires and without jurisdiction. The newly added paragraph to the plaint was to the effect that since the restrictions for the use of which the original acquisition has been intended, had ceased to exist, there was no further necessity for the acquisition and, therefore, the Government should not take any further steps in relation to the acquisition. It was held by Governor, Mevra, J., that the amendment introduced a new cause of action, which was inconsistent with the original one, and the order of the trial court allowing the amendment was consequently set aside. The reason given by him for disallowing the amendment, was that the plaintiff could not introduce in the plaint a cause of action which had not been stated in the notice under section 88. It will be useful to quote his observations on the point. The learned Judge said as follows:

If this were a suit between two parties wherein the compelling necessity of a notice under section 88 Civil Procedure Code, did not exist, probably an amendment like that of allowed in no doubt by a lower court, would not be interfered by this Court. But in this case, section 88 is an imperative bar. Never stating the cause of action has to be given to the Government and a suit can be filed only 90 days thereafter. Section 88 has to be strictly complied with and is applicable to all cases of suits, and all kinds of suits, in the Government of Province of Madras v. *Al. Ar. An. Pillay Chettiar* (1) the Court has held that section 88 Civil Procedure Code is explicit and mandatory. Where the section has not been complied

such, a court has no jurisdiction to try the action instituted against the Government.

After discussing some reported cases on the question the learned Judge went on to observe:

As I am of opinion that the amendment now allowed has introduced a fresh cause of action which was outside the scope of the suit as originally framed and was inconsistent with the allegation made earlier, the learned Sub Judge was not justified in allowing the amendment, nor as its refusal no previous notice has been served on the Government informing them of this new cause of action.

There is thus no doubt that when a suit is instituted against the Government, it is not open to the plaintiff to make a fundamental departure in his plaint from the cause of action already mentioned in the notice under section 88 of the Code of Civil Procedure. In the instant case the plaintiff had served two notices on the U. P. Government. The said notices were sent by registered post to the Collector of Kanpur. One of them is dated the 30th January 1943, and is Ex. N. The other one is dated the 18th/22nd June 1943 and is Ex. VIII. Both these notices stated that on the 15th August, 1943 and 6th September 1944, the Executive Engineer Kanpur Division Lower Ganges Canal entered into contracts with the plaintiff for the lease of the suit properties, that the plaintiff was entitled to the vacant possession of the suit properties by virtue of the two contracts dated the 15th August and 6th September 1944 and that, if possession of the suit properties were not delivered to the plaintiff within two months of the date of the receipt of the notices, the plaintiff would institute a suit against the Government for the specific performance of the contracts or for damages for breach of contracts. It is noteworthy that nowhere in these notices either expressly or impliedly, has it been stated that the contracts were nullified by the Government, and the Government was therefore also liable on account of its repudiation of the contracts. The reason for this

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arrogant is obvious. It has never struck us the plaintiff or his advisers up to the time of arguments in appeal, when one of us pointed out the serious infirmity in the documents evidencing the agreements to least the last proposition that the agreements were unenforceable against the Government because they were expressed to be made in the name of His Majesty the King Emperor and not the Governor of U. P. as required by section 175(4) of the Government of India Act, 1935. Only when it was pointed out by us that the agreements upon which he was seeking to rely could not impinge any liability upon the Government because they had not been executed in conformity with the provisions of section 175(4) of the Government of India Act, 1935, turned round for the plaintiff used to allege the case by falling back upon the plea of ratification of the agreements by the Government. Be that as it may we are quite certain that neither of the reasons mentioned the fact of ratification of the agreements by the Government. The plaintiff also does not mention any fact or facts which may enable us to hold that the plaintiff had taken the plea of ratification of the agreements by the Government. The evidence oral and documentary also does not indicate that the Government had in fact ratified the agreements in question.

In short the position therefore is that Ratification of the agreements which are *ex facie* unenforceable against the Government, was not stated in the notice under section 80 of the Code of Civil Procedure. It was also not pleaded in the plaint and the record of the case does not contain any fact or facts which would show that the Government had in fact ratified the said agreements.

Agreements as they stand are defective and unenforceable against the Government. It may be that the plaintiff may use the Executive Enquiries as the strength of those agreements, but that would not afford him a cause of action to try the claim against the Government. The Government could be bound by those agreements only if it had ratified them. Agreements by themselves have

got no force and efficacy against the Government and the act of ratification alone could create a privity of contract between the plaintiff and the Government. The act of ratification would, therefore, be a matter of substance and would constitute the vital link in the chain of facts which would make up the cause of action for a claim against the Government. Merely ratification of the plaintiff's cause of action against the Government is ineffectual and incomplete. Since the notice under section 80 of the Code of Civil Procedure did not mention the fact of ratification of the defective agreements by the Government, it would not be open to the plaintiff to introduce by way of amendment the plea of ratification in the plaint, for that would mean substantial variance from the notice. A plaintiff cannot be permitted to urge that the defendant should not be allowed to impeach the enforceability of the agreements in suit for the first time at the stage of hearing of the appeal, because that would deprive him of the opportunity of proving non-fulfilment of the alleged agreements by the Government. No question of prejudice can arise here in this case, if we permit the defendant to question the enforceability of the agreements for the first time at this stage on the ground of their non-conformity with the provisions of section 173(2) of the Government of India Act, 1915, because the plaintiff did not raise in his notice under section 80 that the Government had ratified the alleged and agreements, and he cannot now be permitted to take that plea. We have consequently permitted the defendant to argue that the agreements, which were the basis of the suit in this case, were not expressed in the name of the Governor of U. P. and could not, therefore, be enforced against the Government of U. P. If any authority is needed to support what we have done, it will be found in a decision of their Lordships of the Supreme Court in the case of *Kankhal Lalbhai Patel v. Lalbhai Tribhulal Mehta Ltd* (1). In that case a suit was filed for the recovery of damages for breach of contract for non-delivery of certain cotton goods. The plaintiff's claim was decreed by the trial court, but on appeal it

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was dismissed. The High Court dismissed the claim on the ground that the agreement was vague and uncertain. No such plea was ever taken in the trial court, nor even on the grounds of appeal. It was contended that the appellate court went wrong in allowing the appellants to raise an objection for the first time in appeal that the agreement was vague and uncertain. Mr. JUSTICE P. B. Gajendragadkar repelled this contention and observed as follows:

It cannot be said that it was not open to the High Court to allow such a plea to be raised even for the first time in appeal. After all, the plea raised is a plea of law based solely upon the construction of the letter which is the basis of the case for the escape of time for the performance of the contract and so it was competent to the appellate court to allow such a plea to be raised under Order 41, rule 2 C P C II on a fair construction, the condition mentioned in the document is held to be vague or uncertain, no evidence can be admitted to remove the said vagueness or uncertainty. The provisions of section 93 of the Indian Evidence Act are clear on this point. It is the language of the document alone that will decide the question. It would not be open to the parties or to the court to attempt to remove the defect of vagueness or uncertainty by relying upon any extrinsic evidence. Such an attempt would really mean the making of a new contract between the parties. That is why we do not think that the appellants can now effectively raise the point that the plea of vagueness should not have been entertained in the High Court.

Just as in this case the agreement was on its face vague and uncertain and no extrinsic evidence could be produced to remove the vagueness and uncertainty in the agreement, similarly in this case the agreements as their face are unenforceable against the Government and no evidence can be introduced in the case to prove that the Government had ratified those agreements because the fact of ratification has not been stated in the notice

under section 56 of the Code of Civil Procedure. The question that the Government cannot be held for damages for breach of these agreements therefore, is a question of construction of the agreement and is a pure question of law and may be permitted to be raised for the first time at the stage of the hearing of the appeal under Order XLII rule 2, Civil Procedure Code.

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Reference was placed by learned counsel for the plaintiff all on the decision of their Lordships of the Supreme Court in *Kalyansingh Laxmi Warkha Ltd v State of Bihar* (1). The plaintiff appellant is that case filed a suit against the State of Bihar for the specific performance of a contract. The suit was decreed by the trial court but on appeal the Patna High Court reversed the judgment and dismissed the suit. One of the grounds for dismissing the suit was that the contract, not having been executed by the proper authority, was not enforceable against the Government on account of section 70 of the Government of India Act, 1915. On appeal before their Lordships of the Supreme Court it was urged on behalf of the plaintiff that the defendant did not plead in its written statements that the contract was unenforceable because it had not been executed by the Collector who was admittedly the proper authority for that purpose. There was no ground in the memorandum of appeal to that effect, and the High Court should not have permitted the defendant to take that objection for the first time at the stage of arguments on appeal. Their Lordships of the Supreme Court upheld the contention and ruled that the objection ought not to have been allowed to be raised. We have given our careful consideration to the case, and it seems to us that the decision in that case turned on its own peculiar facts. It appears that the plaintiff had sent six copies of the draft lease to the Collector for signature. Two of these were returned to him and they did not bear the signature of the Collector. The other four copies were not produced by the defendant, so that the plaintiff's argument was that if the defendant had taken the plea of unenforceability of contract at the proper time, he would have procured the production of

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the four withheld draft leases which would have shown that they bore the signature of the Collector. In these circumstances, it is quite evident that the objection about the unenforceability of the contract was not a pure question of law but it also involved investigation of the fact whether the withheld draft leases were signed by the Collector.

In the case before us, it has not been urged that there was some other document of lease which was expressed to be made in the name of the Governor. The reason under section 80 of the Code of Civil Procedure and the plea alleged that the plaintiff and the Executive Engineer entered into an agreement for the lease of the disputed plots on 25th August, 1944, and that the plaintiff signed on 25th August, 1944 some documents. In his statement in cross the plaintiff admitted that on 25th August, 1944, the Executive Engineer had agreed orally to let out the disputed plots to him. He also admitted in cross examination that both he and the Executive Engineer had signed the printed lease forms on 25th August, 1944. He did not state that he had signed some other documents, besides the printed lease forms, which are Exs F, G, H and I. He then founded his claim on the said documents alone. We may also mention here that while the defendant's counsel was arguing before us on 18th July, 1958, we invited the attention of counsel for the plaintiff to the affidavit filed in the documents Exs F, G, H and I. Counsel for the plaintiff opened his arguments on 25th July 1958 and made an unequivocal statement which has gone down in the notes of arguments made by one of us, that the order, dated the 25th August, 1944, of the Executive Engineer accepting his offer constituted the basis of his claim. He did not then say that there were some other documents confirming the agreement between him and the Executive Engineer and they were expressed to be made in the name of the Governor.

There is one other circumstance which distinguishes this case from the *Kalpanpur* case (1). While in that case

the defendant had not denied in its written statement the enforceability of the contract, in this case the defendant has made an admission in paragraphs 21 and 22 of its written statement that the issues Nos. F, G, H and I were void and unenforceable, and correct legal proceedings had not been observed in their execution. No doubt the defence, that the issues aforesaid were void, is available for non-compliance with the provision of section 174 (3) of the Government of India Act, 1935, has not been pleaded specifically in so many words, but such a plea was implied in the facts stated in paragraphs 21 and 22 of the written statement. To sum up, we consider that in view of the distinguishing features indicated above, the *Kalyanpur* case (1) is not applicable to the facts of this case.

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H. G. H.
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We have carefully perused the entire evidence in the case and we are satisfied that, in the circumstances of this case, the Government could not have probably satisfied the agreement in question. As already stated, the agreements, marked Nos. F, G, H and I, were entered into on the 25th August, 1944. It appears that possession of the demised property was not given to the plaintiff, so that on the 22nd November, 1944, the plaintiff sent a letter, Ex. XIII, to the Executive Engineer requesting that he should arrange for delivery of possession at his earliest convenience. Possession could not still be delivered, and hence the plaintiff sent a notice under section 85 of the Code of Civil Procedure to the Collector Kanpur, on the 5th January, 1945. A reply to the notice was sent from the office of the Executive Engineer on the 22nd February, 1945. The reply letter is Ex. IV. It states that as it was not possible to give possession of the demised property to the plaintiff, the amount of Rs. 5,000 which was deposited by the plaintiff on account of rent in advance, was being returned by a crossed cheque. Thereafter the plaintiff served another notice under section 80 on the Collector, Kanpur, on the 15th/22nd June, 1945. In reply to that notice the office of the Executive Engineer informed the plaintiff by its letter, Ex. X, dated 25th/27th August, 1945, that

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the leases executed by the plaintiff and the Executive Engineer were unregistered and were not legally binding.

The defendant examined one Deep Chand, Overseer, Canals, on his behalf. He stated on cross-examination that the leases of lands adjoining the canal bank, Kanpur, had always been executed by the Executive Engineer and the confirmation or ratification of such leases by any other authority was not necessary. According to him, the Executive Engineer, Canals, was the final authority for giving leases of lands adjoining the canal bank irrespective of the terms of the leases. It would thus appear from his cross-examination that the agreements in question could not have been sent to the Government for ratification.

Learned counsel for the plaintiff then invited her attention to paragraph 3 of the plaint as well as written statement. In paragraph 3 of the plaint it is averred that the offer of the plaintiff, being the highest offer, was accepted by the Executive Engineer for and on behalf of the defendant and it was stated that the plaintiff would be given the lease of the disputed lands for five years. It is further stated that the plaintiff was asked to deposit Rs. 1,000 as an advance rent in advance and the plaintiff deposited the said amount on the 25th August, 1949. Paragraph 3 of the written statement filed by the defendant states that the contents of paragraph 3 of the plaint were admitted. Learned counsel for the plaintiff submits that the defendant's admission of the facts stated in paragraph 3 of the plaint would amount to ratification of the agreements in question by the defendant and the claim of the plaintiff comes, therefore, to end as having been wrongly deferred by the trial court. This argument though apparently plausible and attractive, is inherently fallacious. Ratification, as we have already said, is an essential link in the chain of facts which would constitute the plaintiff's cause of action against the defendant. Without ratification the plaintiff would have no cause of action to institute a suit against the defendant. A cause of action must be antecedent to the suit and it cannot be split out of any allegation

made in the pleadings of the parties in the two suits. See *Kamraj Mohal v. Durga Chandra* (1). We most deeply regret the commission of learned counsel for the plaintiff that the defendant's admission of the facts mentioned in paragraph 3 of the plaint amounted to ratification of the quantified agreements.

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Learned counsel for the defendant lastly contended that the trial court has erred in awarding damages to the plaintiff. The plaintiff and the Executive Engineer had undoubtedly entered into agreements to the effect that the latter would let out some lands belonging to the Government in the city of Kanpur. Later on, for reasons which are not material in finding the quantum of damages, the Executive Engineer failed to deliver possession of the demarcated property and tried to evade from the agreements. There was, therefore, undoubtedly a loss of bargain to the plaintiff and he was entitled to get appropriate damages for the loss of bargain. It appears from the evidence that after coming from the agreements the Executive Engineer let out by public auction the two plots in Sahas Mandi and Ghosia Mandi. The remaining two plots, which were also to be let out to the plaintiff, were however, not let out by the Executive Engineer and they were retained by the Government. The plaintiff had offered a rent of Rs 18-8-8 per day for the plot in Sahas Mandi and Rs 12-14 per day for the plot in Ghosia Mandi. The total of these two sums comes to Rs 30-8-8. These two plots were let out by a subsequent public auction at Rs 45-8 per day. It seems that in the course of arguments before the trial court learned counsel for the parties had made an agreed statement that the profits from the alienated two plots could be estimated at 25 per cent of the daily rental of the plots. In other words the estimated profits calculated at the rate of 25 per cent would be about Rs 11 and odd per day. Calculated at this rate the total amount of estimated profits for a period of five years which was the term of the lease would exceed the sum of Rs 18,270, which has been awarded as damages by the trial court. We think that, in the circumstances of this case, damages to the

rate of Rs 15,200 was not excessive. Kanpur is the biggest industrial city in this State and daily profit of Rs 11 from the trade in Saba Mandi and Ghansari Mandi does not appear to be unreasonable. We believe that the plaintiff could have made even higher profits. But since he has agreed to claim damages at the rate of about Rs 11 per day, he is not entitled to an amount higher than the sum of Rs 15,200 which was awarded to him by the trial court.

The result of the foregoing discussion is that the appeal of the defendant will have to be allowed and the plaintiff's suit dismissed. Since the appeal is being allowed mainly on a ground which had not been specifically taken by the defendant either in the trial court or before us, and it was indicated by one of us in learned counsel for the defendant, we consider that it will be proper to make the costs very low, as well as in the trial court. Accordingly we allow this appeal and set aside the judgment and decree of the trial court and dismiss the suit. The parties shall bear their own costs in circumstances of the case. The cross-objection is also dismissed.

(SIGNED)

Appeal allowed

APPELLATE CIVIL

Before Mr Justice F. D. Bhargava*

and Mr Justice Nigam

MAHENDRA SHANKER SRIVASTAVA (Appellant)

vs

K. C. MITTAL, DISTRICT MAGISTRATE

LUDHIANA AND OTHERS (Respondents)

1958

December

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*Allegation of the House-Registration, for public purpose—
 Minister—Nahan—Overstated, scope of United Provinces
 (Temporary) Accommodation Regulations Act 1947 r. 2,
 applicability of*

The District Magistrate, Ludhiana, on April 12 1958, requested the house no. 97 situated at Lalwasingh, Ludhiana, under a 2 of the U. P. (Temporary) Accommodation, Regn. Act, 1947. This house was allotted to and was occupied by B. S. L. Srivastava who acted as a house for both the late, Mr. M. S. Srivastava the petitioner was living with B. L. Srivastava as a guest or as a relative, he applied for allotment but on April 12 1958, a notice was served by the District Magistrate to B. L. Srivastava that the house was requisitioned and B. L. Srivastava was directed to hand over possession to the East. Central and Eastern Office, Ludhiana. M. S. Srivastava contended that he was an occupier and he should be served with the notice.

Held that the person who was living as a guest of the allottee cannot be considered as an occupier of the premises and the occupation of the applicant was only with him and his wife of the allottee.

Held further that the petitioner had no grounds to challenge the validity of the District Magistrate's order as he was not an occupier.

Special Appeal No. 34 of 1958 against the order passed by Tribunal J., dated 11th September, 1958.

The facts appear in the judgment.

K. S. Farooq for the appellant.

Standing Counsel for the respondents was 1 to 3.

The judgment of the Court was delivered by—

V. D. BHARGAVA, J. —This is an appeal against an order of a learned Single Judge of this Court in a writ petition dismissed by him in 1956. The writ petition

Writ of Habeas

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was filed seeking to obtain a writ compelling the order of the District Magistrate, Lucknow, dated 15th April, 1958 by which he had requested under section 3 of the U. P. (Temporary) Accommodation Requirements Act, 1947, a house no. 27 situated at Lohmurgang, Lucknow. That house was allotted to and was occupied by Bihari Lal Srivastava. He had built his own house and he was likely to shift to that building and possibly he had shifted. The petitioner was living with Bihari Lal according to his contention as a guest or as a relation. When Bihari Lal practically completed his house, the petitioner moved the Rent Control and Eviction Officer to allot the premises in dispute to his favour but no allotment was made. On the contrary on 15th April, 1958, a notice was served by the District Magistrate on Bihari Lal Srivastava, the allottee of the accommodation, that the premises had been requisitioned under section 3 of U. P. (Temporary) Accommodation Requirements Act, 1947, for public purpose. By the same notice Bihari Lal Srivastava was directed to give possession of the premises to the Rent Control and Eviction Officer, Lucknow. The contention of the petitioner is that though Bihari Lal Srivastava was served with a notice but no such notice was given to him although he was an occupier of the premises.

The petitioner further contended that he was notified by the District Magistrate that an alternative accommodation will be provided to him but no such accommodation has been provided and therefore, he cannot be evicted under section 3 of the Act till an alternative accommodation is provided to him.

The learned single Judge was of opinion that the petitioner was not an occupier and had no right to remain in the premises and consequently he dismissed the petition. Aggrieved by that decision, this appeal was filed.

We have heard learned counsel for the petitioner and we are of opinion that the petitioner is not an occupier of the premises. He was staying in the house, according to his own contention, as a guest of Bihari Lal Srivastava. That would not give him any right to occupy the house.

It was open to Dehari Lal Sinha to go at any time to ask him to vacate the premises and therefore the occupation of the premises was only with leave and licence of Dehari Lal and that did not create any such right in the petitioner as to make him an "occupier" within the definition of the word under the U. P. (Temporary) Accommodation for Quarters Act, 1947.

It was also contended by the learned counsel for the applicant that the requisition by the District Magistrate was not for a public purpose. We do not wish to go into that question because unless the petitioner has a locus standi to challenge the petition, he can not challenge the validity of the District Magistrate's order. The petitioner has no locus standi as he was not an "occupier". The writ petition was rightly rejected by the learned Single Judge.

The appeal is accordingly dismissed.

Since the appeal has been dismissed the stay order dated 17th October, 1958, is also discharged.

Appeal dismissed.

APPELLATE CRIMINAL

Before Mr. Justice Mukherji and Mr. Justice Broom
KHANZADAN SINGH

v
STATE

1959
March 21

Charge—robbery—murder—Punishment for—General rules—Indian

Penal Code 1860 s. 302

As a general rule the sentence of death should normally follow a conviction under s. 302 Indian Penal Code unless it can be made out for awarding a lesser sentence and there is an express or implied distinction between the facts and s. 302 of the Code.

Lal Singh v. Empire (1) distinguished on the ground that the distinction therein made is unimportant and unhelpful.

Criminal Appeal No. 148 of 1959 connected with Criminal Appeal No. 9 of 1959 from an order of the

(1) A. I. R. 1958 (2) 623-624

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Chander Prakash, 1st Additional Sessions Judge, Shikhar, Jharkhand, in Criminal Sessions Trial No 154 of 1934, decided on 15th December 1934

The facts appear in the judgment

A. M. Mitra for the appellants

The Deputy Government Advocate for the State

The judgment of the Court was delivered by—

Mitra, J. —Appeal no 9 of 1934 is by Pooey against his conviction under section 396 Indian Penal Code and a sentence of imprisonment for life awarded to him by the First Additional Sessions Judge of Madhyachpur. Appeal no 148 of 1934 is by Khansay Singh against his conviction by the same learned Judge at the same trial at which Pooey was convicted, under section 386, Indian Penal Code and a sentence of death. There is the usual reference by the learned Judge for the confirmation of the sentence of death awarded by him to Khansay Singh.

The facts going into the circumstantial case appear in what is a short compass and may briefly be stated as follows.

On the night between the 10th and the 11th of April 1934 a band of 20 or 25 men broke into the house of one Balbir Sahai, while they were armed with firearms and other weapons, and there by the use of firearms caused the death of Ram Bharnoy, brother of Balbir Sahai, Dewarka Prasad his uncle, Kusum Urmala Devi, his daughter, and Shyam Lal a neighbour of his. Some of the other inmates of the house of Balbir Sahai were also injured. These were Sumati Gya Devi, the wife of Ram Bharnoy, Sumati Sita Pyari, the wife of Madan Lal, and Dhanraj Var. At the time when the deaths occurred none of the inmates of Balbir Sahai, Balbir Sahai was sleeping in the courtyard with his little daughter Urmala. In the same courtyard slept his brother Ram Bharnoy, his uncle Dewarka Prasad, and the nurse-in-law Gya Devi, Sumati Sita Pyari, another inmate of the house slept in a verandah adjoining the courtyard. On the outside slept Madan Lal and Dhanraj Var. They slept near the four walls and the truster which had been fixed in

the house and belonged to Balker Sahai. All the witnesses named people received injuries.

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The first knowledge that the house had been raided by dacoits was when Balker Sahai was fired at from the roof by one of the dacoits. This shot caused injury to Balker Sahai and some others that slept in the courtyard and also brought about the death of the little infant Urmila. Soon after the firing of the first shot two dacoits jumped onto the courtyard with lathis. One of the dacoits while jumping stumbled, fell and sustained some injury. When the dacoits had jumped onto the courtyard Balker Sahai and Ram Bharnsey made an attempt to tackle them with the result that the other dacoits who were on the roof jumped into the courtyard to the assistance of their two companions who had jumped into the courtyard earlier. In all some 30 or 15 dacoits got into the courtyard of Balker Sahai. Gaurdas Prasad and Ram Bharnsey were shot and killed by the dacoits because they attempted to grapple with some of the dacoits in the courtyard. After causing injuries and killing people the dacoits thought of leaving the house for, apparently, they found that they had ransacked the entire village and that villagers in large numbers were collecting outside. Shyam Lal one of the neighbours set a torch fire on fire in order to obtain a brilliant source of light which could illuminate the entire area and thereby make every man's eye and apprehension of the misdeeds possible. The dacoits, when they found Shyam Lal setting fire to the torch bar and declaring that he had recognised people shot at Shyam Lal and killed him. The dacoits left without taking any property from the house. The sources of light inside the courtyard were a lantern which was burning there, the reflected light from the flashing of torches which the dacoits themselves indulged in, and later on the light which emanated from the burning torch bar just outside the courtyard.

The dacoits had been seen by witnesses of both kinds, namely those that were the inmates of the house and those that collected from outside. None of the dacoits appears to have been recognised for they were unknown to

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 Name
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the witness. In evidence, however, it has appeared that Shyam Lal was shot and killed when he showed out that he had recognized some demons, whether Shyam Lal did recognize some one among the movements or not cannot now be known.

A first information report of the incident was made at police station Sahibnall, which was five miles from Daura Lalpur, the village of incident, on the 11th of April 1918, at 4-45 a.m. The report had been written out by Balbir Sahai at the village and had been sent to the police station through Apuldas Prasad Yadav. The Station Officer Har Bhajan Singh was present at the time when Apuldas Prasad handed the written report. Ex-Ra 10 at the police station. So that Har Bhajan Singh at once left for the place of occurrence. On reaching there Har Bhajan Singh recorded the statements of Balbir Sahai, Ganga Devi, Mahan Lal, Bhawan Vm, Bita Pyari, Hara Lal, Hemraj, Ram Lal, Balraj, Prithvi, Minna Lal and a few others. He wrapped the four dead bodies well prepared separate reports in respect of each and thereafter he sent the bodies to the Sahar mortuary for post-mortem examination through two constables. He also sent the request for medical examination. A site plan was also prepared by the Investigating Officer. The Investigating Officer found the chairs of one of the windows down of the house of Balbir Sahai broken. Balbir Singh brought out two cartridges from inside the house and handed them over to the Investigating Officer. Five other cartridges were handed over to him which had been picked up from outside the house. Two separate memorandums were prepared in respect of the cartridges found from the two places. The cartridges were separately sealed. One hundred and eighty three pellets 25 wide were also found in the courtyard and round the walls of it and these were also taken in possession and a proper recovery memorandum prepared in respect of them. Six pellets were recovered from the coat of deceased Gurdas. These were also sealed and a recovery memorandum prepared. Carnia blood stained garments were also taken possession of by the Investigating Officer.

The injured were examined and their examinations revealed that some had gun shot injuries, while others had lacer injuries on their persons.

A post mortem was performed on the body of Ram Sharma on the 13th of April 1968 at 5 p.m. His autopsy revealed that he had died of gun shot injuries.

Shyam Lal's body was subjected to a post mortem on the same day at 5 p.m. and his autopsy revealed that he too had died of gun shot injuries.

The autopsy on Devdhar Prasad's body was held at 2 p.m. on the same day and in his case there were over and above the gun shot wounds, two contusions which could be ascribed to falling injuries but in his case too death was due to the gun shot injuries.

The autopsy on the body of Karam Uroda was performed at 4 p.m. on the 13th of April, 1968, and it revealed that she too had died of gun shot injuries.

On the 25th of April, 1968, Har Bhajan Singh happened to go to police station Maharaja in connection with the investigation of another dacoity and there he learnt that that day i.e. 22nd April 1968 the police of Mahasab had arrested three persons Lalla, Rajab Ali and Pency. The investigating Officer came to know thereafter that these three arrested persons could have been participants in the dacoity in the house of Balbir Sahai. On the 2nd of May, 1968 Khamsaley Singh, the appellant in Appeal no. 148 of 1959 was arrested at 1.30 a.m. near the bridge of Masauli, by Har Bhajan Singh himself. The arrested persons were made to lie flat and sent to the police lock up. At the time of the arrest of Khamsaley Singh he was found to be in possession of a country made gun and five cartridges. A recovery memorandum, there fore, was prepared at the spot and the same was witnessed by four persons, Jyoti Chander, Deep Chander, Manjit Lal and Sahibdar. This recovery memorandum, Ex. K-88, is a detailed document and gives a detailed description of the gun and the cartridges as also the high photo which too was found in the possession of Khamsaley Singh. Two of the witnesses who witnessed the recovery

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memorandum, namely Shanker Lal and Durg, were produced in court and they satisfactorily proved the recoveries which were alleged to have been made from the person of Khamandey Singh.

Fourth, appellants in Appeal no. 3 of 1959, denied all connection with the accident. The case was that he had been falsely implicated in the case and that he was, after his arrest, shown to the witnesses. He further took the plea that he was known as Baffur Sahas because he used to bring grain to the flour mill of Baffur Sahas for payment of having it ground, and that during one such transaction he had a dispute with Pankha, P. M. 4, who was on the street of Baffur Sahas.

Khamandey Singh, appellants in Appeal no. 142 of 1959, made a statement to a Magistrate in which he more or less admitted having taken a certain part in the dacoity which was committed in the house of Baffur Sahas. This statement of Khamandey Singh was recorded on the 31st of May, 1958. It appears that the Inspecting Officer had made a report to the effect that Khamandey Singh was likely to make a confession but before action could be taken on that it appears that Khamandey Singh hereafter sent an application to the District Magistrate of Noida on the 26th of May, 1958, in which he expressed a desire to make a statement declaring true facts to the District Magistrate. When Khamandey Singh said in that application was this:

Shikhar ji Meri haridit akcha hai to hamein hi
dharan mein pahunch kar Shikhar, Le paripatrik
saya saya kaise hi over prapt ho

On receiving this application the District Magistrate, Sir S. P. Arora, directed his City Magistrate to go to the jail and record Khamandey Singh's statement. The City Magistrate accordingly went to the jail on the 26th of May, 1958 but Khamandey Singh refused to make a statement to him and requested his desire to make a statement only to the District Magistrate. Therefore, Sir Arora, the District Magistrate, very properly, has still sent to the jail on the 31st of May 1958, and then

Kharandey Singh made a fairly long statement to him which was recorded by the District Magistrate. The content of the statement made by Kharandey Singh is Ex. Ea 34. On the statement there is an endorsement to the effect that the Magistrate had explained to Kharandey Singh that he was not bound to make a confession and further that if he did make one, the confession was likely to be used as evidence against him. The learned Magistrate also warned Kharandey Singh about making a confession and asked him several questions to find out whether or not Kharandey Singh was going to make a statement under some threat, promise or some other suggestion. The learned Magistrate's impression was that Kharandey Singh was making the statement voluntarily. An examination of the answers which Kharandey Singh gave at his preliminary examination by the learned Magistrate indicates to us also that Kharandey Singh made his confession voluntarily.

The evidence against the two appellants, Parray and Kharandey Singh in the two respective appeals, is chiefly of identification in the case of Parray it is purely so while in the case of Kharandey Singh, apart from the evidence of identification, there was his own statement and further there was the corroborative evidence furnished by the expert evidence of Shezan Niswan, the Ballistic Expert to Government which showed that the gun which had been recovered from the possession of Kharandey Singh at the time of his arrest was one of the guns which had been used at the time when the dacoity had been committed at the house of Balbir Sahai, for one of the empty cartridges which had been picked up from the place of incident appeared without doubt to have been fired from the gun which was recovered from Kharandey Singh's possession.

Kharandey Singh was summoned to the Magistrate's Court during the committal proceedings on the 15th of August, 1933, and there among other things that he stated he also stated that there had been fired during the course of the dacoity but not with the object of killing but with the object of scaring away people. He

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 apparently
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 source :
 certainly stated in this statement that he had gone to
 commit a robbery. He also, curiously enough, said that
 he was caught in the course of the same robbery. When
 asked: Do you want to say anything else, he answered
 as follows:

I and 20-22 other persons went to commit a
 robbery at the house of Balbir Sahai. I had a
 country made gun, while the rest had English guns,
 knives, spears and axes. All of us examined their
 war, we got property worth Rs 120-Rs 150 in the
 robbery. Guns, knives, etc. were used to scare away
 People secured injuries and lost their lives in the
 course thereof. Both these accused were not with
 me.

By the last sentence he apparently meant Preeti and
 Nandhi Singh (an accused who was convicted by the
 learned Sessions Judge but whose appeal is not before
 us). In the Court of Sessions Kharsuley Singh admitted
 having made the statement dated the 18th August, 1968,
 before the Commuting Magistrate's Court. He further
 admitted that he had sent an application to the District
 Magistrate and had made a statement to him and that
 the said statement (Ex. Ka 14) was correct. In the
 Court of Sessions, however, Kharsuley Singh said that
 he did not fire the gun, though he admitted having had
 a gun and admitted having gone to the house of Balbir
 Sahai to commit a robbery.

The question that arises in connection with Kharsuley
 Singh's appeal is whether there was sufficient evidence
 to justify his conviction under section 384, Indian Penal
 Code, and further whether the sentence which had been
 awarded to him by the trial Judge, namely the sentence
 of death, was a proper sentence. Kharsuley Singh was
 put up for identification on the 15th of May, 1968. All
 his narrative marks were taken and he was mixed with
 20 other undertrials and every precaution was taken by
 the Magistrate who conducted his identification parade,
 to see that the identification was a fair and honest identification.
 Hence, Kharsuley Singh was identified by Balbir
 Sahai, Gura Devi, Madan Lal, Dharam Vin, Harsing,

Son Pyari, Bulaya, Ram Lal, Hira Lal and Munna Lal. The learned Judge did not rely on the identification of Madan Lal, Dharna Wu and Hira Lal because he found the probable value of their identification not very good, but the value of the remaining seven witnesses was found satisfactory by the learned Judge and we have ourselves seen absolutely no reason to take a different view. These witnesses had ample opportunity and on the prisonization case which we believe there was ample light which made watchful and recognition fairly certain. Khamshey Singh's plan at the time of the identification parade that he had been shown to witnesses at police station. In short, was in our opinion fair. The identification evidence against Khamshey Singh was genuine, over-whelming. As we have said earlier, there was no space. Khamshey Singh further evidence to show his guilt and that evidence lay in the fact that the gun which had been recovered from his possession was shown to have been one of the guns which was used at the time of the dacoity because one of the spent cartridges which had been picked up from the scene of occurrence was shown to have been fired from this gun. The evidence of Shanti Narain, the Ballistic Expert left no room for doubt on this score. We have already stated that the evidence of the recovery of the gun from Khamshey Singh's possession was satisfactory. The evidence therefore of Khamshey Singh's participation in the incident was overwhelming and indeed on his own statement he admitted that he had participated in the dacoity, though, according to him, he was not responsible for any of the murders which had been committed during the course of the dacoity.

Mr. R. N. Mitra, appearing on behalf of Khamshey Singh, contended that the sentence of death which had been awarded to Khamshey Singh was not an appropriate sentence. His contention was that the evidence did not indicate that any of the people who died, died as a result of the firing indulged in by Khamshey Singh. It is no doubt true that the witnesses did not state that Khamshey Singh, in particular, fired at any person and that as a result of his firing any particular individual

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was his death, but on the evidence it is perfectly clear that Khannadry Singh used his gun and was one of the gunmen forming part of the assembly of thieves. Under section 304 Indian Penal Code, the sentence which is available is either death, or imprisonment for life or rigorous imprisonment for a term which may extend to ten years, and also fine. Mr. Mehta relied on a decision of this Court in *Lal Singh v. Emperor* (1) as content that as a general rule a sentence of death should not follow a conviction under section 304 Indian Penal Code and that a sentence of death should only be imposed under section 304 Indian Penal Code when there was evidence to indicate that the accused had been responsible for killing some one with his gun. We regret we are unable to accept the contention of Mr. Mehta. The observations on which reliance was placed by Mr. Mehta were in these words at page 451 second column:

We do not consider that as a general rule a sentence of death should necessarily follow a conviction under section 304 Indian Penal Code and that section differs from section 302, Indian Penal Code, in that respect. The rule is under section 302 that a sentence of death should follow unless reasons are shown for giving a lesser sentence. No such rule applies to section 304, Indian Penal Code.

As we read section 302 Indian Penal Code we find that section saying:

Whoever commits murder shall be punished with death or transportation for life and shall also be liable to fine.

Section 304, Indian Penal Code, says that

If any one of five or more persons who are conjointly committing dacoity commits murder as so committing dacoity every one of those persons shall be punished with death or transportation for life or rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

(1) A. I. R. 1924, at 425.

The obligation in the matter of imposing the sentence is, in our judgment, in the same sequence in the two sections only that in section 360 Indian Penal Code, the scope of the discretion is larger in so far as there is the possibility of imposing a sentence lesser than death or transportation for life (plus imprisonment for life) for an offence punishable under that section.

For
the
purpose
of
this
case
Section 1

Section 367 of the Code of Criminal Procedure, as it stood before the amendments of 1955, by clause (3) cast a duty on the court to record its reasons for not inflicting a death penalty on a convict for an offence which was punishable with death. That obligation was not confined to the awarding of a sentence under section 302, Indian Penal Code, only, for death was a punishment prescribed and awardable for a conviction under section 304, Indian Penal Code, also. Therefore, in our opinion—and we express it with respect—the discretion that was born by the learned Judge in Lal Singh's case (supra) was an unbridled discretion. At any rate the workings of the relevant sections, which we have quoted above, did not justify that view. After the amendments to section 367, Criminal Procedure Code, in 1955 it is no longer obligatory for the trial Judge to give reasons for imposing the lesser penalty, but that amendment has nothing to do with the point that has cropped up for our decision—what we have to decide is whether, as we said before, the sentence that had been imposed by the trial Judge on Khamsadai Singh was an appropriate sentence. In our opinion it certainly was, for we have found that Khamsadai Singh not only participated in the dacoity but also used his gun and there is no presumption that a gun when fired means its mark. Parliament is awarded in order to achieve any or as many as possible of the four objectives, namely to serve as deterrent, to be preventive, to be reformatory and to be retributive. Of these four the first is the all important one, others being merely accessory. Prevention has to be before all things deterrent, for the chief end of the law of crime is to make the evil doer an example and a warning to all that are like-minded with him.

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 No. 1
 of 1958
 (Bihar)

Parliament is intended to prevent offences being committed by destroying the interest to which they owe their origin by making all deaths which are important to others, important also to the State. Courts ought to think that punishment must make the real death feel that his act was an ill bargain for him.

The confession which Khemndey Singh made and which has been held to have been made voluntarily by him reflected that this was not his first venture in dacoity. Further crimes of violence with the aid of firearms, whether they be of local manufacture or not, are becoming more and more common. Courts cannot shut their eyes to common trends, which magnify the results of a crime, for courts are called upon in the discharge of their duties to make our punishment as commensurate with the sole object of protecting society against acts of criminality. So that, unless courts properly consider the question of sentence in relation to the circumstances in which a crime is committed and the nature of the crime keeping in mind also the fact as to how often such crimes are committed, courts will never be able to discharge their obligation properly. We therefore are of the opinion that whatever may have been the position as regards the use of firearms in dacoities in the year 1938, when Lal Singh's case was decided, the position has considerably worsened since then and it is necessary, in our opinion, therefore, to view dacoities in which fire arms are used with seriousness, and that whenever a dacoit is proved to have used a gun in the course of the dacoity, whether he actually killed or injured some one or not, he should be awarded a sentence of death. We are of the opinion that the element of the seriousness in such cases should be given its proper place in measuring the measure of the punishment. We therefore, are of the opinion that the sentence which had been imposed on Khemndey Singh, namely the sentence of death, was well merited. We accordingly affirm that sentence.

Returning now to the appeal of Prady, the evidence against him consisted, as we have stated earlier, of identification alone. He had been identified by Balbir Sahai,

Ganga Devi and Prabhu. Both Bhabu Sahas and Ganga Devi were injured. None of the three witnesses made any mistake. We have already held that these witnesses had ample opportunity of seeing the appellars, Peary and that visibility at the time was good. So that, in our opinion, the evidence against Peary was also sufficient to sustain his conviction. We accordingly uphold his conviction and his sentence as well.

In the result we dismiss Peary's appeal (Appeal no 2 of 1932) and uphold his conviction under section 304 Indian Penal Code and his sentence of imprisonment for life. We also dismiss Khumandey Singh's appeal (Appeal no 148 of 1932) and uphold his conviction under section 304 Indian Penal Code, and his sentence of death. The reference by the trial Judge for the confirmation of the sentence of death awarded by him to Khumandey Singh is accepted. The same shall be carried out in accordance with law.

Appeal dismissed

CIVIL MISCELLANEOUS

Before the Honourable C. M. Mackinnon, Chief Justice and Mr Justice Dwyer

SWARUP SINGH (Applicant)

129
April 1933

ELECTION TRIBUNAL, MUNICIPAL BOARD,
ALLGARH AND OTHERS (Respondents)

Municipal Election—Ballot paper marked on the back only—Whether and when it is required—Chief Proprietor, Shreegopal Das (Contract of Election of Members) Order, 1928, para 41 (a)(1)(g) and 64 (f)

A ballot paper is not liable to be rejected simply because it is marked on the back only. If the symbols are distinctly visible on the reverse and the mark placed thereon clearly indicates the candidate for whom the vote has been cast, there is sufficient compliance with the provisions of the United Provinces Municipalities (Contract of Election of Members) Order, 1928 for a duly marked ballot paper.

1951
 Justice
 Gault
 v.
 State of
 Arizona.
 Supreme
 Court
 of the
 United
 States

Carol Macfarlane Writ No. 1534 of 1958

The facts appear in the judgments

T. M. Stephens and K. B. E. Gower for the applicant

F. C. Khare for the opposite party

MAJORITY, C. J. —I agree that the petition must be dismissed. The question is whether the five ballot papers which had been marked on the back are valid. The circumstances in which the question arose are as is to be hoped, most unusual. On the face of these ballot papers are printed four vertical columns headed respectively (a) Hindu; (b) Social number; (c) Names of candidates with party affiliation; and (d) any, (e) Symbol of symbols assigned; and space for marking. On the back of the form is printed the number of the form and the instructions for voting. In the case of each of these ballot papers with the doubtful exception of ballot paper no. 149 the ink used for impressing on the face of the ballot paper the vertical and horizontal lines, the number of the candidate and the symbols has penetrated the ballot paper with the result that everything printed on the face of the ballot paper appears also on the back of it, although of course the order of the columns, the symbols and the names of the candidates are reversed. The symbols are perfectly clear, but the names of the candidates cannot be read as each letter is reversed. A human voter would therefore be able to distinguish between the front and the back of the form, but an illiterate voter might well be in doubt.

New paragraph 43 of the C. P. Municipalities (Conduct of Election of Members) Order, 1953, provides that an elector shall "make a mark on the ballot paper opposite the name of the candidate or each of the candidates for whom he intends to vote," and clause 46 of paragraph 54 (f) provides that the Returning Officer shall reject a ballot paper "if no vote is recorded thereon. The argument is that the phrase "on the ballot paper" means, and means only, on the face of the ballot paper. It is, therefore, contended that as the electors in the case of these five ballot papers have marked their choice on the back, the ballot papers were rightly rejected by

the Returning Officer and might not in have been caused by the Election Tribunal. There is, however, a presumption that every voter who applies for a ballot paper intends to vote for one or more candidates. Each of the marks made on these free ballot papers is opposite the names of the candidates and I do not think that there can be any doubt with regard to the candidate or candidates for whom the voter was voting. It is true that the marks made by the voters are not opposite the names of the candidates for the printing of those names, being returned is not legible. But I understand that the whole purpose of assigning a symbol to a candidate is to substitute something easily recognizable by a voter who voting in his illiteracy is unable to read the names of the candidates. The symbol, in other words, must be treated as taking the place of the name. For all practical purposes, so far as election matters are concerned, a mark opposite an assigned symbol is a mark opposite a name, and in the particular instance of this case I am of opinion that the mark made by the voter on the back of the ballot paper is a mark on the ballot paper within the meaning of paragraphs 45 and 46 of the 1913 Order. I have some hesitation in holding that the Election Tribunal was right in counting the votes recorded on ballot paper no. 148, but as the contents of this ballot paper would not affect the result the matter is not of importance.

I agree with the order proposed by my brother.

BARUA, J.—This is a petition under Article 123 of the Constitution by Jyotsna Singh, whose election, as a man for Scheduled Caste candidates, on the Municipal Board, Aligarh, was set aside by the Election Tribunal on the election petition filed by Champa Lal who had obtained the next highest number of votes. Jyotsna Singh, according to the declaration obtained, 1,259 votes and Champa Lal, respectively no. 2, 1,246 votes.

One of the grounds on which the election of Jyotsna Singh was challenged was that twelve of the votes cast for Champa Lal were wrongly rejected by the Returning Officer and that he had wrongly counted one vote

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By order
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cast for Sourup Singh as valid. The Election Tribunal held in favour of Champa Lal that eleven of the reported votes had been wrongly rejected and that one vote omitted for Sourup Singh should be reported. In the result, therefore, Champa Lal according to the Election Tribunal obtained 1217 votes and Sourup Singh obtained 1214 votes. The Election Tribunal, therefore, set aside the election of Sourup Singh and declared Champa Lal to be the duly elected candidate.

Sourup Singh by this petition prays for the quashing of the order of the Election Tribunal.

The learned counsel for the petitioner does not dispute the finding of the Tribunal about the wrong rejection of six votes, namely votes recorded on ballot papers nos. 2994, 148, 147, 1108, 218 and 2913. He has challenged the finding with respect to the other five ballot papers, namely nos. 112, 148, 79, 2919 and 2927. The voters who voted on these ballot papers made the marks on the back of the ballot paper and ran on the front and were probably led to do so because the symbols which were made previously, than the voters' names appeared clearly on the back of the ballot papers as well. The Returning Officer rejected these ballot papers because the voters marked on the back side of the ballot papers. The Election Tribunal did not consider it to be a good reason to reject it and the court, relying on behalf of the petitioner, is that any mark made on the back of the ballot paper amounts to the signature marking on the ballot paper by the voter. It is not contended and could not have been successfully contended that the marks on the back side were not meant for the respondent (Champa Lal). The questions of law for decision raised in the case are whether such a marking on the back of the ballot paper is against the directions contained in paragraph 43 of the U. P. Municipalities (Conduct of Elections of Members) Order, 1953 as amended up to 2nd January, 1958 and whether such a ballot paper would be covered by sub-clause (g) of clause (1) of paragraph 54 of the aforesaid Order.

I do not consider such marking in the particular case to be marking against the provisions of paragraph 43.

This paragraph directs the voter to make a mark on the ballot paper opposite the name of the candidate for whom he intends to vote. To ascertain the candidate the ballot paper contains the name and also depicts the symbol allotted to that particular candidate. The symbol was clearly visible on the back of the ballot paper. The name was not. In the circumstances marking on the back of the ballot paper cannot be said to be against this direction. I do not agree with the commission for the petitioner that the direction to mark, on the ballot paper amounts to a direction to mark on the face of the ballot paper and that it is the face of the ballot paper alone which is really the ballot paper. The entire sheet of paper is the ballot paper, of course one side of it is the face of the ballot paper and the other is the back side of the ballot paper.

Paragraph 54 clause (1) mentions seven grounds for either or more of which the Returning Officer is bound to reject a ballot paper. The only ground relied upon by the petitioner in justification of the Returning Officer's rejecting these votes is the ground mentioned in sub-clause (g). That ground is that the Returning Officer shall reject a ballot paper if no vote is recorded thereon. When a voter has made marks on the ballot paper though on the back side it cannot be said that no vote has been recorded on that ballot paper. I am, therefore of opinion that the Returning Officer could not validly reject these ballot papers on the ground mentioned in sub-clause (g). No other ground mentioned in clause (1) affects the present case.

Clause (2) of paragraph 54 really deals with the rejection of a ballot paper on which a mark indicating the vote has been placed. This clause is

A vote recorded on a ballot paper shall be rejected if the mark indicating the vote is placed on the ballot paper in such manner as to make it doubtful to which candidate the vote has been given.

The proviso to this clause is not relevant for the purpose of the case. A ballot paper on which a vote is

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marked can be rejected only if the Returning Officer is unable to make out as to which candidate the vote has been given. There could be no case of a doubt in the present case as for whom the vote has been cast. The votes had been cast for Champa Lal as they were marked opposite his symbol. These ballot papers therefore could not have been rejected on view of the provisions of clause (2).

We were referred to the notes in paragraph 246, p. 140 Volume 14 Halsbury's Laws of England, Third Edition. The note is

A ballot paper marked on the back only should not be counted even though the marks show through the paper on to the front. A ballot paper marked both on the back and on the front may however be counted.

These short notes, however, do not indicate on what provisions of law such an interpretation was placed and therefore this reference of these notes is not of help in the passages when the provisions of clause (2) of paragraph 64 are so clear.

For the reasons stated above I am of opinion that the petition has no force. I would accordingly reject it with costs.

By the Court—The petition is dismissed with costs.

The interim order of stay granted by this Court on the 26th November, 1958, is discharged.

Petition dismissed.

APPELLATE CIVIL

Before Mr Justice Garia and Mr Justice Dasgupta

RAJNATH SINGH and another (Plaintiffs)

THE OUDH TRIBUT^v RAILWAY (Defendants) 1952
AIR 4

Workmen and employees—Claim for compensation—Oudh Tribut Railway through its General Manager, whether employer for purpose of a claim by the widow deceased. Workmen's Compensation Act, 1923, ss. 2 and 10—Code of Civil Procedure, 1908, s. 10

Having regard to the scheme of and the definitions under the Workmen's Compensation Act, it seems evident that a claim by or on behalf of a railway servant against the Railway through its General Manager is a claim against the employer and is maintainable as such. A claim to enforce the employer's liability under s. 10 of the Act cannot be said to be a suit under the Code of Civil Procedure so as to attract and be delayed by the provisions of s. 10 of the Code. *Chandra Mohan v. District of India* (1) considered.

First Appeal from Order No. 18 of 1952 from an order of S. N. Tripathi, Commissioner for Workmen's Compensation, Gorakhpur, dated the 29th of March, 1948 in Miscellaneous No. 4/1.

The facts appear in the judgment.

Jagdish Saurup and Har Saurup for the appellants.

Brij Lal Gupta for the respondents.

The judgment of the Court was delivered by—

GARIA, J.—The appellants before us are the minor sons of Ravi Lal Singh. They filed a claim for compensation under section 10 of the Workmen's Compensation Act, 1923 before the Commissioner for Workmen's Compensation appointed under the said Act. Their statement of claim was registered as Miscellaneous Application no. 2 of 1948.

The claimants alleged that their father was employed as S. F. W. I. in the service of the Oudh Tribut Railway at Bahpur Railway Station and that he died on 18th March, 1947 from an accident involving heavy collision of a light engine with a trolley which he was plying to remove the creep from Gorakhpur. Thus the claim

set out the details of the accident and stated that the claimants were the main stay of the deceased and wholly dependent on him and that the family had heavily suffered for which legitimate compensation was due to the dependents and the members of the family. They stated that a claim for compensation made to the Railway had been rejected and they claimed a sum of Rs 3,500 by way of compensation. The counter affidavit of the respondent appellants no. 1 of 1948 showed the Oudh Tiffin Railway through its General Manager retaining its Railway Quarter, Gonda, as the opposite party. A written statement was filed by the opposite party, the Oudh Tiffin Railway through the General Manager. We are not concerned with the other pleas in the written statement except plea no. 18 which runs as follows:

That the defendant does not represent the railway owned by the State for the purposes of the civil suit.

We would like to add that the written statement admitted that the appellants, Kalyan B. Ram Lal Singh, was employed as a S. P. W. 1 in the service of the Oudh Tiffin Railway.

Upon the pleadings of the parties the Commissioner for Workmen's Compensation issued several orders, but no. 4 was in the following terms:

Case was under section 3 of the Workmen's Compensation Act brought against the General Manager, Oudh Tiffin Railway, without impleading the Governor General.

The Commissioner for Workmen's Compensation, by his order dated 23rd March, 1949, found that the applicants were entitled to a compensation in the sum of Rs 3,500 but he dismissed the claim nevertheless upon the ground that the suit was not brought against the Governor General, who was the employer, as it should have been under the Workmen's Compensation Act but was brought against the General Manager of the named railway who was not the employer. He was of the view that the General Manager Oudh and Tiffin Railway,

could not be considered either as the employer or as the managing agent of the employee, the General Government and since the Oudh and Tibet Railway was owned by the Central Government for that reason as his view the application for compensation should have been filed against the Government General. He took the view that since the Governor General was not a party the application could not succeed. He was of the view that the application could be brought against the General Manager only if it were proved that the General Manager was the managing agent of the Oudh and Tibet Railway and that the onus of proving that lay on the applicant and he pointed out that between the Governor General and the General Manager there are other persons managing the railway, namely the Railway Member of the Government and the Railway Board. Members and there could be only one Managing Agent. He was of the view that the Managing agent must have all the powers of the Central Government delegated to him and that there was nothing on the record to show that the General Manager, Oudh and Tibet Railway had all such powers which the members of the Railway Board have. Finally he came to the conclusion that as the General Manager could not be considered to be the managing agent of the Central Government so no relief could be granted as the opposite party pleaded in the application was not the employer of Ramlal Singh deceased.

This first appeal from order has been filed by the claimants before this Court under section 36 of the Workmen's Compensation Act. It is contended that the claim was properly preferred against the Oudh Tibet Railway through its General Manager and that the Oudh Tibet Railway through its General Manager was the proper person to be impleaded as the employer of Ramlal Singh, father of the claimants. Arguments auxiliary to the above submissions were also made with which we will deal here on. It now becomes necessary in order to adjudicate upon the rival contentions to enquire into the provisions of the Workmen's Compensation Act, 1925 (Act no. VIII of 1925). It is an Act to

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provide for payment by certain class of employers to their workmen of compensation for injury by accident. Employer is defined by sub-section (c) of section 2 of the Act as follows:

employer includes any body of persons whether incorporated or not and any managing agent of an employer and the legal representative of a deceased employer and, when the services of a workman are temporarily lent or let on hire to another person by the person with whom the workman has entered into a contract of service or apprenticeship, means such other person while the workman is working for him.

Managing agent is defined by sub-section (j) of section 2 as follows:

Managing agent means any person appointed or acting as the representative of another person for the purpose of carrying on such other person's trade or business but does not include an individual manager subordinate to an employer.

Workman is defined by sub-section (x) of section 2 as follows:

workman means any person (other than a person whose employment is of a casual nature and who is employed otherwise than for the purposes of the employer's trade business) who is—

(i) a railway servant as defined in section 3 of the Indian Railways Act, 1909, not person actually employed in any administrative, clerical or sub-administrative office of a railway and not employed in any such capacity as is specified in Schedule II, or

(ii) employed on monthly wages not exceeding four hundred rupees in any such capacity as is specified in Schedule II.

Sub-section (2) of section 2 of the Act enacts as follows:

(2) The exercise and performance of the powers and duties of a local authority or of any department,

Turkist Railway or the Oudh and Takuah Railway through its General Manager is the employer of the Indian of these chambers.

We have already quoted the definition of the word employer. It is to be noted that it is an inclusive definition and therefore the concerned persons do not constitute the whole body of persons who may be considered to be employers. The Commissioner for Workmen's Compensation has held that it has not been established that the General Manager is the Managing Agent within the definition of the word 'managing agent' in the Act and he has pointed out that there are other bodies in between the General Government and the General Manager, the Central Government being the ultimate owner of the railway and thus the employer. But the problem that we are examining, we think, is resolved by the provisions of subsection (2) of section 3 of the Act which expressly state that the exercise and performance of the powers and duties of a local authority or of any department acting on behalf of the Government shall for the purposes of this Act unless a contrary intimation appears, be deemed to be the trade or business of such authority or department. Now, therefore, the only question which has to be considered is whether the Oudh and Takuah Railway is a department acting on behalf of the Government and is responsible for the running of the Oudh and Takuah Railway; if so, then the running of the railway will be deemed to be the business of the Oudh Takuah Railway. If the Oudh and Takuah Railway constitutes a department of the Government or an authority as well then the business carried on will be deemed to be its business and if as an authority or department it employed the chambermen, further then it will be considered to be the employer. In the definition of a railway service given in the Workmen's Compensation Act reference is made to the Indian Railway Act, 1930. We may, therefore, usefully refer to the Indian Railway Act to find out what exactly is the position in this case as regard to the running of the Oudh and Takuah Railway by the General Manager. We find that section 3 subsection (2) of the Indian Railway Act, 1930 (Act no. IX of 1930), defines railway administration

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as a railway administration or administration in the case of a railway administered by the Government means the Manager of the railway and includes the Government and in the case of a railway administered by a railway company means the railway company. Section 4(7) defines a railway servant as meaning any person employed by a railway administration in connection with the service of a railway. It would thus appear that the Manager of the railway is the administrator under the Indian Railways Act and the Manager is required to run the Government. He can, therefore, be said to be running the department which is directly concerned with the business of managing the railway. Even under the definition given in the Railway Act he is put on the same footing as Government itself it may even be said that he exercises the functions of managing agents given in the Workmen's Compensation Act. In view of the definition of railway administration as given above he may be deemed to have all the powers of the Government necessary to the running of the business. We have referred to the statement in the claim that Ram Lal Singh was in the service of the Oudh Tirhut Railway. These allegations were not denied by the opposite party, the Oudh Tirhut Railway. Keeping in view the definition of employer given in the Workmen's Compensation Act, which we have pointed out, is an inclusive definition and the definition is not limited to the enumerated kinds we do not see any reason why it should not be held in this case that the General Manager of the Oudh and Tirhut Railway was the employer of that particular railway servant, the father of the claimants. We have typed this in the language of subsection (2) of section 3 of the Workmen's Compensation Act in which we have made a reference. We think if ordinary persons were asked, after being told the facts of this case, the question as to who was the employer of the father of the claimants they would certainly answer the Oudh and Tirhut Railway through its General Manager. We think it is a well settled proposition that in dealing with matters relating to the general public interests are presumed to use words in their popular sense as laymen vulgar. For authority

we need only refer, *mutatis mutandis*, to Macaulay on Interpretation of Statutes 1963 at page 14. The authorities cited in support of the proposition are given at footnote (a) on page 14. It is not necessary to recite those cases specially. We think it is permissible also to refer to this statement as a dictionary meaning as given in the Shorter Oxford English Dictionary. We have examined the meaning of the word "employer" and we find it to mean one who employs, or pays, or hires, etc. for wages. We have no difficulty in seeing of what we have said in coming to the conclusion that the claimant's father was having regard to the definition and the scheme of the Workmen's Compensation Act employed by the General Manager, Gudu Tiber Railway or by the Gudu Tiber Railway through its General Manager. We must, we think, construe this Act in such a way that its purpose will be fulfilled. The Act relates to the question of compensation between employers and employees. None of the persons who would be entitled to the benefit of this Act are distant persons, and so far as they are concerned when they enter into the service of a railway, which is run by a General Manager, they do not think that they are entering into the service of the Central Government but that they are taking up employment with the railway which for all practical purposes from their point of view functions as an independent authority or department. No doubt there are officials further up in the hierarchy beyond the General Manager and there is no doubt of the ultimate ownership of the Central Government but the question is whether having regard to the provisions of section 2 subsection (2) of the Workmen's Compensation Act and the definition of employer as given in section 2 (3) (c) of the Act in all the circumstances it could be said that the employer in this case was the Gudu and Tiber Railway through its General Manager. There is no written contract between the Governor General and the late employer produced in this case. We have no difficulty in answering the short and question in favour of the appellants.

We may now state that we were present in this case with a Full Bench sitting of the Asian High Court in

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the case of *Chander Mohan Saha v. Union of India* (1). That was a case in which a claim was made under section 59 of the Indian Railways Act for compensation, and the opposite party contended was not the railway itself through its General Manager, but was the Union of India. The contention advanced was that the Railway through its General Manager should have been impleaded, and that the suit should fail because of non-joinder and exclusion was placed on rule 15, Order I, Civil Procedure Code.

Section 59 of the Indian Railways Act lays down that a suit for compensation for injury to through booked traffic has to be filed against the railway administration in whose railway the injury has occurred. In the *Azamgarh* compensation was claimed under that section and the argument advanced was that the suit had to be filed against the railway administration and not against the Union of India.

For the purpose of this argument, the definition of railway administration as given in the Railways Act was pressed and it was said that the railway administration meant the General Manager of the railway. That argument was countered by the Bench by pointing out that the word "railway administration" as defined in the Railways Act included the Government or the State and then it was said that a suit which was argued as seeking a relief against the Government had to be filed in accordance with the provisions of the Civil Procedure Code and that section 29 of the Civil Procedure Code clearly indicates that in a suit by or against the Government, the authority to be named as plaintiff or defendant in the case may be itself be: (a) in the case of a suit by or against the Central Government—the Union of India and, (b) in the case of a suit by or against a State Government—the State. It was argued in reply that section 59, Railways Act, requires service of notice on the General Manager of the Railway in the case of a suit against the Central Government, but it was said that only a notice was required to be delivered to the

General Manager, but a suit if it sought a relief against the Government, had to be filed in accordance with section 79 of the Code and it was the view of the Bench that section 79 of the Civil Procedure Code and section 85 of the Railway Act being no way in conflict because the railway administration under the definition given in the Railway Act included the Government. It was, however, pointed out that if the plaint failed to establish a cause of action against the Central Government a suit would fail. In the end the Bench was of the view that it was not necessary to apply the particular railway through its General Manager and the suit was not bad for non-joinder.

Now it may be pointed out in view that the present claim is in no way a suit under the Civil Procedure Code. It is merely a claim which is created by an ordinary person and not by a plaintiff and it is created before a Commissioner who is not a civil court. We have already indicated that the Civil Procedure Code is applied only to a limited extent by section 84 of the Workmen's Compensation Act. This claim moreover is also not a claim under the Railway Act at all and therefore section 84 of the Railway Act is inapplicable. Also because of what we have indicated under 78 of the Civil Procedure Code is not attracted. We do not, therefore, think that the fact of the Assam High Court compelling us to hold that the claim for compensation should have been against the Central Government and that it was made against the wrong person. However, if in their claim the claimants had made out that their deceased father was an employee of the Central Government, then of course the position would have been different, but the allegations specifically is that his employer was the Outh and Tibet Railway through its General Manager. We think that the court below erred in coming to the conclusion that the claim preferred must fail because the Outh and Tibet Railway through its General Manager was not the employer, but the Central Government. The consequence must be that the appeal is allowed and in terms of the findings

[illegible]

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Richard Ludlow Davies, by his order dated 18th January, 1955. The operative portion of the order reads:

I would hence allow this remission application, and make the order passed by the learned Rent Control and Eviction Officer and remand the case back to him for deciding it afresh after considering all the evidence available on the record and after allowing the parties an opportunity to be heard. The learned Deputy Commissioner Ludlow, is requested to get the application disposed off by some officer other than the one who has expressed his opinion in the matter.

It is common case of the learned counsel that the order is not happily worded. Apparently the intention of the learned Additional Commissioner was that as the Rent Control and Eviction Officer had expressed his opinion in the previous order, dated 10th August, 1954, it was desirable in the interest of justice to get the matter decided by some other officer. In the interim orders the proper order to pass was to remand the case not to the previous officer but to the District Magistrate and to permit him either to decide the case himself or to authorize some other officer to consider the application under section 3 of Act III of 1947.

The language used by the Additional Commissioner has given rise to all these arguments. As the learned Additional Commissioner worded his order to indicate that he was remanding the case to the Rent Control and Eviction Officer with a request to the Deputy Commissioner i.e. the District Magistrate Ludlow, to get the case disposed of by some other officer. I take the order to be only one of remand and a plain request to the District Magistrate.

Subsequently the District Magistrate did pass an order a copy of which is Ex. 3 on the record. This order reads:

This case will be tried and heard by Sri Sharma, i.e., A. C. M. II and disposed of by him.

W-

(Sd) S. N. M. TRIPATHI

31.1.58

The next construction of the learned counsel is that the District Magistrate passed his order, copy of which is Ex. B as a routine order without being conscious of the facts that were involved. I am unable to see any force in this construction. It is again true that the construction of the learned counsel finds support in the view taken by R. Narain, J. in the case cited above. I am, however, of opinion that cases of transfer of particular cases under Article 2 of Act III of 1947 were not so common that there could be any possibility of a routine order having been passed without attention to the facts of a particular case. The learned counsel has himself conceded that the withdrawal of the officer to whom the case was transferred must have been a deliberate act made by the District Magistrate. There is also the presumption of section 114 of the Indian Evidence Act available in respect of official acts. There is no reason to suspect that this particular official act was performed either negligently or without due care and attention. It should not be necessary to insist on the order indicating the District Magistrate's reasons for the order and thereby compelling him to write longer orders so that the courts may be in a position to decide that the order had been passed after due consideration of the facts of a particular case. I have a presumption available under the law and there is no reason to suspect that the act was not done with all due care and attention. I am, therefore, of opinion that it must be held - unless the contrary is proved that the District Magistrate did perform his functions with full knowledge of the facts involved. It is not necessary to add that in the particular case there is no evidence to indicate the contrary.

No other point has been pressed. I therefore, see no force in this second appeal and dismiss it. There will be no order as to costs in view of the point of law involved. Stay order, dated 26th November 1978, is discharged.

Abstract

1. **Introduction**
 2. **Background**
 3. **Methodology**
 4. **Results**
 5. **Conclusion**
 6. **References**

CIVIL REFERENCE

*Before Mr. Justice P. D. Khigun and Mr. Justice Mulla**

THE LAKSHMI SUGAR AND OIL MILLS LTD
(APPELLANT)

v

STATE (OPPOSITE PARTY)

1952
page 11 Agricultural Income tax—Company claiming deductions in staff salary—Amounts paid—Deductions allowed by the assessing officer—Reference to the Board—Reduction of the staff salary without sanction of—U. P. Agricultural Income Tax Act 1946 s. 15(3) and Indian Income Tax Act 1922 s. 11(3) scope of—

The company is compliant with a notice under s. 11(3) of the United Provinces Agricultural Income Tax Act furnished according to 13th September 1946 claiming deductions in the sum of Rs. 21,428 11. These deductions were allowed by the assessing officer but on revision by the Board, in the month of March, reduced the amount of the staff salary to Rs. 7,428 11 although the assessing officer allowed a deduction of Rs. 11,428 11 on account of the staff salary. Against the order of the Board the reference has been filed under section 16 of the U. P. Agricultural Income Tax Act.

Mild this does bring to material in evidence before the Board it had no power or permission to diminish any part of the deductions claimed as staff salary by the company. Muchach was Cotton Mills Ltd v Commissioner of Income-tax West Bengal (1).

Gurukul Singh v Commissioner of Income-tax Lahore (2) relied on.

Civil Reference No. 6 of 1952 made by Agricultural Tax Revenue Board, U. P., Allahabad, by its order, dated 13th March, 1947.

The facts appear in the judgment.

S. C. Das for the appellants.

Standing Counsel Sri. Kishor B. P. holding brief for opposite party.

*Bengal v. Lakshmi

On A. I. R. 1952 C. 11 On A. I. R. 1948 Lah. 103

The judgment of the Court was delivered by—

V. D. BHARGAVA, J. —This is a reference under section 34 of the U. P. Agricultural Income Tax Act. The Court had directed the Revenue Board to state a case on the following questions:

Whether the Board has any power to disallow any part of the amounts shown by the company in its return of income in respect of salaries of its staff, if we did the Board have any material upon which to hold that the salaries of the staff paid in the previous year amounted to Rs. 7,488 12 1/2.

The facts of the case appear to be that the assessee is a joint stock company run under the name and style of The Lakshmi Sugar and Oil Mills Ltd. Hardua, and the dispute relates to the assessment year 1936-37. The return was submitted by the company and a return under section 13 (5) of the Act was issued and served on the Manager of the company and in compliance with that notice returns were furnished by the company on the 18th September 1936. According to the return the income mentioned therein was Rs. 37,543 7 and the deductions claimed under different heads amounted to a sum of Rs. 29,790 12. So far as the income was concerned it was not accepted by the assessing officer on the ground that according to the report of the persons and according to Government calculations the income should have been Rs. 34,516 12 and since no details of the income had been supplied therefore the assessing officer assessed the income as Rs. 34,516 12 1/2.

As regards the deductions the assessing officer accepted practically all the deductions except a few and allowed a total deduction of Rs. 26,536 12 and the assessment was made on a net income of Rs. 7,986 7 1/2.

There was a revision filed by the assessee under section 22 of the Act and also an application in revision on behalf of the State. The application in revision of the assessee was dismissed but the revision of the State was partly allowed. The assessing officer had allowed a deduction of a sum of Rs. 11,438 12 on account of the staff salary

IN RE
The
Lakshmi
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1936-37
Assessment

1948
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 reduced
 it
 to
 Rs. 7,468-15

This amount was reduced by the Board in the revision by the State to a sum of Rs 7,468-15. The order by which this amount was reduced was in the following words:

"We, however, find ourselves unable to uphold the deduction of Rs 11,488-15 allowed on account of staff salaries. The area of the firm is not more than 1,000 acres. In the return the details of the staff salaries were not given. There were no accounts as required of evidence before the assessing authority and we had to understand how he accepted the amounts alleged to have been incurred on account of salaries when the income as shown in the return was Rs 57,542-9 only. We reduce the amount of staff salaries to Rs 7,468-15."

Learned counsel for the appellant has argued that the cut in the deductions was not based on any evidence or material before the Board, and it was not within the jurisdiction of the Board to reduce the amount in such an arbitrary manner and he placed reliance on *Dhokish v. Cotton Mills, Ltd. v. Commissioner of Income-tax, West Bengal* (1). It was contended by learned counsel for the appellant in the Supreme Court that the returns had been submitted by the company of that year, but the assessing officer had increased the income without any material or evidence being before him. The reasons given for the increase were in the following words:

"From the point of view of profits 1945 was a very good year, if not the best, for all cotton mills. Expenses on energy and fuel show that production was undoubtedly higher whereas it is found that the gross profit by this company is low. I conclude that full amount of sales have not been accounted for. It is expected that actually the rate of gross profit should have been higher this year. In view of the higher costs of establishment I take it that the rate of about 13 per cent, i.e. more about the rate disclosed in 1942 accounts should have been

unannounced I sold back 70-80 shares for unannounced sales

**THE
LATEST
SYSTEM FOR
CITY PLANNING
AND
DESIGN
BY
J. D.
BARNETT**

THE
 LAKSHMI
 BAHADUR
 AGGARWAL
 LTD.
 VS.
 CIT
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an estimate is dropped of that evidence, he should in fairness disclose to the assessee the material on which he is going to found the estimate. And that in that case he proposed to use against the assessee the result of any private enquiries made by him, he must communicate to the assessee the substance of the information so proposed to be relied on, such an action as to put the assessee in possession of full particulars of the case he is expected to meet and that he should further give him ample opportunity to meet it.

and ultimately they held in that case

We are in entire agreement with the learned Solicitor General when he says that the Income tax Officer is not fettered by technical rules of evidence and pleadings and that he is entitled to act on material which may not be accepted as evidence in a court of law, but there the agreement ends. Because, it is equally clear in making the assessment under sub-section (3) of section 23 of the Act, the Income tax Officer is not qualified to make a pure guess and make an assessment without reference to any evidence or any material at all. There must be something more than bare suspicion to support the assessment under section 23 (3).

They further held

The rule of law on this subject has, in my opinion, been laid and rightly stated by the Lahore High Court in the case of *Grimshaw, Tugh v Commissioner of Foresters, Lahore* (1).

They further based their judgment on the principle of fundamental rules of justice. It was observed

In this case we are of the opinion that the Tribunal violated certain fundamental rules of justice in reaching its conclusion. Firstly it did not disclose to the assessee what information had been supplied to it by the departmental expenses staff. Next, it did not give any opportunity to the company to rebut the material furnished to it by him, and lastly it declined to take all the material

(1) A. I. R. 1944 (2) 221

that the assessors wanted to produce in support of its case.

There is also a case of this Court in *Goparath Niah v. Commissioner of Income Tax* (3). There the question arose about the scope and powers of the Income tax Officer under section 23 (3) and there being difference of opinion between Hon. NAGAPPAIAH, J. and Hon. [K. J. A.], J. the question was referred to Hon. NAGAPPAIAH, C. J. who agreed with the view of Hon. NAGAPPAIAH, J. In this case they have pointed out the difference between section 23 (3) and section 23 (4), i.e. an issue which is made after the return has been filed and assessed are not accepted on the one hand, and on the other the assessment on the basis of the best judgment. It was held:

There is no material difference between cases in which notice is taken under section 23 (3) and those under section 23 (4). Where the Income tax Officer acts under section 23 (3) the assessment must be based on evidence. If the evidence adduced by the assessee is not accepted or if the assessee does not produce any evidence, the Income tax Officer must have recourse to other evidence on which to base his assessment and for that purpose he has ample powers under section 23 to call for evidence. The word used is evidence, and not some other word like information. The evidence may not be such as fulfils all the technical requirements as to admissibility (relevancy, etc.) of the Evidence Act, but mere conjecture or mere an assumption of a fact does not amount to evidence within the meaning of section 23 (3). From here the evidence should be taken on the basis of the evidence or under his knowledge in order that he may be able to assess such evidence. The reach of private inquiries made in the absence of and without notice to the assessee is certainly not evidence within the meaning of section 23 (3).

Therefore they discussed the scope of section 23 (3).

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Total Income before deduction of losses
100
Less Losses
10
Total Income

**SUPREME COURT
APPELLATE CRIMINAL**

Before Mr. Justice Imam and Mr. Justice Wadhwa
VISHWANATH

7
STATE OF UTTAR PRADESH

[ON APPEAL FROM THE HIGH COURT AT ALLAHABAD]

Indian Penal Code, 1860 s. 302 d. (v)—Right of personal defence of body—Abused with the intention of abducting—Cruel pretence of Sister—Abducting—murder of

By s. 100 Indian Penal Code the right of personal defence of body extends to the voluntary causing of death where an assault is made with the intent of abducting.

Where an assault was made on the appellants sister by her husband who conspired her by force to go away with her father's house and the appellants collected and armed with loads on the occasion which however failed him, the High Court convicted the appellants under s. 302 Part II Indian Penal Code holding that the right of personal defence of body under s. 100 d. (v) Indian Penal Code, was not available to the appellants as the word "abducting" used there referred to both abducting as well as abducting under the Code and not the mere fact of abduction as is defined under s. 382 thereof.

On an appeal to the Supreme Court, Held that on a plain reading of s. 100 d. (v) Indian Penal Code, the word "abducting" used there means the mere act of abducting as defined under s. 382 of the Code and does not refer to such abducting as is an offence under s. 388 of the Code. An assault having been made on the appellants sister with the intention of abducting her, the appellants were entitled to the right of personal defence of body under s. 100 d. (v) Indian Penal Code.

Held further that the appellants did not induce more harm than was necessary.

The appeal accordingly was allowed and the appellants acquitted.

Imam, v. Ram Dayal reversed.

Criminal Appeal no. 11 of 1944 from an order of the Allahabad High Court dated the 26th April 1937, in Criminal Appeal no. 592 of 1934.

The facts appear in the judgment.

(21-1-48) 1948 at 127

1959
S. P. Datta, Senior Advocate (S. D. Srinivas, Advocate)
versus
Babu
for the appellants

G. C. Marler and C. P. Lal, Advocates for G. N.
Dutta, Advocate for the respondents

The following judgments of the Court were delivered
by—

WILSON, J. —This is an appeal by special leave against the judgment of the Allahabad High Court in a criminal matter. The facts of the case, as found by the High Court, are no longer in dispute and the question that is raised in this appeal is whether the appellants had exercised the right of private defence of persons. The relevant facts for our purposes are these. Gopal deceased was married to the sister of the appellants. The appellants, and his father Babu were living in a railway quarter at Ghazipur. Gopal's sister was married to one Banarsi, who was also living in another railway quarter nearby. Gopal had been living for some time with his father-in-law. They did not, however, pull on well together and Gopal shifted to the house of Banarsi. Babu persuaded Gopal to come back to his house but the relations remained strained and eventually Gopal shifted again to the quarters of Banarsi about 15 days before the present occurrence which took place on 11th June, 1955 at about 10 p.m. Gopal's wife had remained at home with her father as she was unwilling to go with Gopal. Her father Babu and her brother Vishwanath appellants sided with her and refused to let her go with Gopal. Gopal also suspected that she had been carrying on with one Moti who used to visit Babu's quarter. Consequently Gopal was keen to take away his wife, the more so as he had got a job in the lace department some months before and wanted to lead an independent life. On 11th June there was some quarrel between the appellants and Gopal about the girl but nothing unusual happened then and the appellants went back to his quarters and Gopal went away to Banarsi's quarter. Gopal asked Banarsi's sons to help him in bringing back his wife. Banarsi also arrived and then all four of them went to Babu's quarter to bring back the girl. On reaching the place Banarsi and his two sons stood outside while Gopal

went on. In the meantime Radu came out and was asked by Banaru to let the girl go with her husband. Radu was not agreeable to it and asked Banaru not to interfere in other people's affairs. While Radu and Banaru were talking, Elzabet came out of the quarry dragging her reluctant wife behind her. The girl caught hold of the door as she was being taken out and a tug of war followed between her and Gopal. The appellant was also there and showed us his father that Gopal was screaming. Radu thereupon replied that if Gopal was adamant, he should be beaten (pe matat). On this the appellant took out a knife from his pocket and stabbed Gopal once. The knife penetrated into the heart and Gopal fell down senseless. Scarps were taken to arrest Gopal but without success. Thereupon Gopal was taken to the hospital by Radu and the appellant and Banaru and his wife and some others but Gopal died by the time they reached the hospital.

On these facts the Sessions Judge was of opinion that Radu who had merely asked the appellant to beat Gopal could not have realised that the appellant would take out a knife from his pocket and stab Gopal. Radu was therefore acquitted of abetment. The Sessions Judge was further of opinion that the appellant had the right of private defence of person and that this right extended even to the causing of death as it arose on account of an assault on his wife which was with intent to abduct her. He was further of opinion that more facts than the circumstances of the case required was not caused and therefore the appellant was also acquitted.

The State then appealed to the High Court against the acquittal of both accused. The High Court upheld the acquittal of Radu. The acquittal of the appellant was set aside on the ground that the case was not covered by the 15th clause of section 100 and that the right of private defence of person in this case did not extend to the voluntary causing of death to the assailant and therefore, it was allowed. The High Court relied on an earlier decision of its own in *Kingdon v. Joan Sarge* (1). The

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appellant was therefore committed under section 304, Part II of the Penal Code and sentenced to three years rigorous imprisonment. He applied for a writ habeas to enable him to appeal to this Court but this was refused. Thereupon he applied to the Court for special leave which was granted and that is how the matter has come up before us.

The main question (therefore) that falls for consideration in this appeal is whether the decision in *Ram Saran's* case (1) is correct. It appears that four other High Courts have taken a view which is different from that taken in *Ram Saran's* case, namely *Jagat Singh v. King Emperor* (2), *Durga Lalur v. Emperor* (3), *Sekha v. The State* (4) and *Devising Laxmi v. State* (5). There is, however, no discussion of the point in those four cases and we need not refer to them further. The view taken in *Ram Saran's* case (1) is that the word 'abducting' used in the 4th clause of section 168 of the Penal Code refers to such abducting as is an offence under that Code and not merely to the act of abduction as defined in section 302 thereof. Most abduction is not an offence and therefore cannot give rise to any right of private defence and the extended right of private defence given by section 168 only arises if the offence which constitutes the exercise of the right is one of the kinds mentioned in section 302.

Section 97 gives the right of private defence of person against any offence affecting the human body. Section 98 lays down that the right of private defence in no case extends to the inflicting of more harm than it is necessary to inflict for the purpose of defence. Section 100 with which we are concerned is in these terms:

The right of private defence of the body extends, under the restrictions mentioned in the last preceding section, to the voluntary causing of death or of any other harm to the assailant if the offence which constitutes the exercise of the right be of any of the descriptions hereinafter mentioned, namely:—

(1) I.L.R. (1948) 44 447.

(2) A.I.R. 1952 Lah. 102.

(3) A.I.R. 1952 Pat. 367.

(4) A.I.R. 1952 Nag. 149.

(5) A.I.R. 1952 M.B. 421.

First—Such an assault is not, reasonably, cause apprehensions that death will otherwise be the consequence of such assault.

Secondly—Such an assault is not, reasonably, cause the apprehensions that grievous hurt will otherwise be the consequence of such assault.

Thirdly—An assault with the intention of causing serious injury.

Fourthly—An assault with the intention of gratifying carnal lust.

Fifthly—An assault with the intention of kidnapping or abducting.

Sixthly—An assault with the intention of wrongfully confining a person under circumstances which may reasonably cause him to apprehend that he will be unable to have recourse to the public authorities for his release.

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The right of private defence of person only arises if there is an offence affecting the human body. Offences affecting the human body are to be found in Chapter XVI from section 299 to section 377 of the Penal Code and include offences in the nature of that of criminal force and assault. Abduction is also in Chapter XVI and is defined in section 362. Abduction takes place whenever a person is forced, compels or by any unlawful means induces another person to go from one place to another place and, sample as not, an offence under the Penal Code. Such abduction with certain intent is punishable as an offence. If the intention is that the person abducted may be maintained as at disposed of as to be put in danger of being murdered, section 364 applies. If the intention is to cause terror and wrongful confinement, section 363 applies. If the abducted person is a woman and the intention is that she may be compelled or is likely to be compelled to marry any person against her will or may be forced or induced to illicit intercourse or is likely to be so forced or induced, section 365 applies. If the intention is to cause grievous hurt or to dispose of the person abducted as to put him in danger of being subjected to grievous hurt, or slavery or to the unnatural loss of

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180D

an, person means 367 applies. If the abducted person is a child under the age of ten and the person is to take dishonestly any movable property from an person, section 360 applies. It is said that unless an offence under one of these sections is likely to be committed, the fifth clause of section 180 can have no application. On a plain reading however, of that clause there does not seem to be any reason for holding that the word "abducting" used there means anything more than what is defined as "abduction" in section 342. It is true that the right of private defence of person arises only if an offence against the human body is committed. Section 180 gives an extended right of private defence of person in cases where the offence which constitutes the offence in the right is of any of the descriptions enumerated therein. Each of the six clauses of section 180 talks of an assault and assault is an offence against the human body. (See section 352.) So before the extended right under section 180 arises there has to be the offence of assault and that assault has to be one of the six types mentioned in the six clauses of the section. The case in *Ravi Sanyal* (supra) seems to overlook that in each of the six clauses enumerated in section 180 there is an offence against the human body, namely assault. So the right of private defence arises against that offence and what section 180 lays down is that if the assault is of an aggravated nature as enumerated in that section, the right of private defence extends even to the causing of death. The fact that when describing the nature of the assault some of the clauses in section 180 use words which are themselves offences as, for example, "grievous hurt", "rape", "kidnapping", "wrongfully confining", does not mean that the emergency with which the assault is committed must always be an offence in itself. In some other clauses the words used do not refer to the offence (do not themselves amount to an offence under the Penal Code). For example, the first clause says that the assault must be such as may reasonably cause the apprehension of death. Now death is not an offence anywhere in the Penal Code. Therefore, when the word "abducting" is used in the fifth clause that word by itself need not be an offence in order that that clause may be taken advantage of by or on behalf

on a person who is associated with means to offend. All that the clause requires is that there should be an example which is an offence against the human body and that graph should be with the intention of abducting and wherever those elements are present the clause will be available.

Further the definition of abduction is in two parts, namely (1) abduction where a person is compelled by force to go from any place and (2) abduction where a person is induced by any deceitful means to go from any place. Now, the fifth clause of section 380 contemplates only the kind of abduction in which force is used and where the result is with the intention of abducting the right of private defence that arises by reason of such assault extends even up to the causing of death. It would in our opinion be not right to expect from a person who is being abducted by force to pause and consider whether the abductor has further weapons as provided in one of the sections of the Penal Code, proceed alone before he takes steps to defend himself, even to the extent of causing death of the person abducting. The framers of the Code knew that abductors by itself was not an offence unless there was some further intention coupled with it. Even so in the fifth clause of section 380 the word "abducting" has been used without any further qualification to the effect that the abducting may be of the kind mentioned in section 384 onwards. We are therefore of opinion that the view taken in *Ram Kraya's case* (1) is not correct and the fifth clause must be given full effect according to its plain meaning. Therefore when the appellant was being abducted even though by her husband and there was an assault on her and she was being compelled by force to go away from her father's place, the appellant would have the right of private defence of the body of her sister against an assault with the intention of abducting her by force and that right would extend to the causing of death.

The next question is whether the appellants were within the regulations prescribed by section 89. It was argued

filled a void for politicians against the backdrop of the depression and the Depression Commissioner Leitch at the University of the State of Florida. On this September 1947 letter is a comprehensive language the phrase "and the object of the act is to ensure that the public is not misled" and the phrase "and the object of the act is to ensure that the public is not misled" is present.

On 1988 was paid to the husband the dividend no. 2 by the Court of Wards for the City of Washington and on 7th September 1989 there was an order by the Court of Wards under which it was ordered that the maintenance allowance which was paid under the share of company name 12th September 1980 will be charged against the share of the defendant no. 2, the share of the capital of the share from the Court of Wards. It shall be a sole balance when the amount will be obtained from share of the defendant no. 2 the monthly-allowance his share in the proceeds will be reduced proportionately. On 12th September 1981 there was a comparison and it was agreed that the Court of Wards defendant no. 1 shall retain income to cover the purchase 12th October 1981, in such a way that pay income only by the defendant no. 2 shall be reduced from his share of the property and if any balance is still found payable from defendant no. 2 it shall be repaid in the first charge out of the share of the profits of defendant no. 2 when the purchase of the 1988 per month to the defendant no. 2. It was the condition is stipulated that payment in the financial year income of the dividend share from defendant no. 2 shall be a low charge on the assets of the corporation which will be payable to the defendant no. 2 and shall be retained to cover the expenses of doing good, such corporation in its share of the share of dividend no. 2, not cost.

When JANET'S NAME came to me, I found that there was a 1940 year which had been paid to the detective as if she applied and I don't know that year was given to her at all, and that!

The Sixth Circuit, like the Eighth Circuit, was split on the issue. In *United States v. Smith*, 618 F.2d 1043 (6th Cir. 1980), the court was divided 10-8 on whether the District Judge presiding over the case was required to conduct such a hearing. The majority, led by the chief judge, was a mixed appellate panel, but, like the other panels, the dissenters argued that certain circumstances were not likely to be sufficient under 41 to show the desirability of the retention of a judge without the warning of Art. II of 1949 that the desirability of the retention be established.

Model 2 is also applicable to the Canadian Debt Reduction Act's rules for debt under a 103-Cred Proceeding Code, before the prevailing claim in the opposition does not exist or the claimant has not declared its debt and it is only the asset which can

Wards. The deed contains recs. about 1944 and a suit for partition was brought by Bharya Bhagwan Prasad Singh respondents in Execution Case Appeal no. 18 of 1954 and by Rangar Singh who was manager of a share from Bharya Bhagwan Prasad Singh who is respondent in Appeal nos. 4 of 1954 and 5 of 1954 and is opposite party in Civil Revision no. 91 of 1955. Amongst the defendants was the Deputy Commissioner and the appeal lost. Raj Kumar Lal Har Shankar Singh husband of Kishori Lal.]

On the 11th of September 1947 a compromise was entered in between the plaintiffs and the defendant no. 2 that is the appellants—the Deputy Commissioner was only a party as being the Manager of the Court of Wards—by which it was agreed that a sum for partition be decreed thus plaintiff no. 1 that is Bharya Bhagwan Prasad Singh was entitled to one third share that plaintiff no. 2 that is Rangar Singh was entitled to one third share and the defendant no. 2 that is Raj Kumar Lal Har Shankar Singh was entitled to the balance of the one third share. A decree on the above terms of compromise was thereupon passed.

A final decree for partition was passed on the 11th of April 1948, and during the pendency of the case after the death of Smt. Kishori Lal the Court of Wards had later paying a sum of Rs. 500 to defendant no. 2 that is Raj Kumar Lal Har Shankar Singh as maintenance.

An application was made to the court that this payment should be stopped. On the 24th of September 1948 there had been certain statements made by the court for the parties. On behalf of Rangar Singh it was stated that he had no objection to the maintenance allowance in dispute being paid to defendant no. 2 that is the present appellants by the Court of Wards. This statement was made because on behalf of defendant no. 2, that is the appellants, a statement was made by Sri Raj Kumar Shrivastava, his counsel, that his client had no objection if the court or trustees of the estate was released from the superintendence of the Court of Wards on the plaintiffs paying two-third of the debt due from the estate. His further stated that his client would have no

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1959	objection of the maintenance allowance that he got since the date of the compromise that is the 15th of September 1947 is debited against his share at the rate of the release on other words the amount was to be debited from one third share in the cash and movable of the estate at the rate of the release
<u>Bartholemew</u> <u>the</u> <u>defendant</u> <u>vs</u> <u>the</u> <u>Plaintiff</u> <u>Bartholemew</u>	
<u>v. B.</u> <u>Bartholemew</u>	After the above statement the court passed the following order

In view of the above statement of parties counsel I withdraw the objection. The maintenance allowance that will be paid by the Court of Wards to the applicant since the date of the compromise viz. 15th September 1947 will be debited against the share of the applicant at the rate of the release of his share from the Court of Wards. If share will be cash balance then the amount will be debited and from his share in a otherwise his share in the movable will be reduced proportionately.

There was no further compromise on the 15th of September 1951. Later also as provided as follows.

About the money paid to defendant no. 2 by the Court of Wards since 15th September 1947 the date of decree it is agreed that the Court of Wards defendant no. 1 shall adjust accounts between the parties by the 15th of October 1951 in such a way that from the money payable to the parties according to their share i.e. one third each the payments made to defendant no. 2 shall be adjusted and if any balance is still found payable from defendant no. 2 it shall be regularly paid as the first charge out of the share of profits of the defendant no. 2 after the payment of Rs. 100 per month to the defendant no. 1. In case the remainder is exhausted the payment to the plaintiff on account of the abovementioned from defendant no. 2 shall be a first charge on the estate of the compromise which may be payable to defendant no. 2 and shall be realisable at once by execution of decree against such compromise on the date of the decree of defendant no. 2 is not.

passed the decree which can reduce the debt and the executing court has not been given any right. Thus if the application that had been given by the judgment debtor before the executing court cannot be called a preliminary application under section 43 and if the decree is not under section 47 it would not give a right of appeal simply because the application was headed under section 45. This was the preliminary point taken by the decretor before about the maintainability of the three appeals. We strongly agree with the learned counsel for the respondents that no appeal lies.

On raising the question involved in the appeals it is the same which is involved in the revision and even so, say, now we are against the judgment-debtor on revision and we think that the decree of the trial court was correct.

These matters had actually come before one of us and once the question involved was an important question of law they had been referred to a bench.

Learned counsel for the appellants had urged that the amount which was due from the judgment-debtor was a debt as defined in the U. P. Zamindari Debt Regulation Act. In section 2 of the Act debt has been defined as follows:

debt means an advance in cash or in kind and includes any transaction which is an advance; a debt law does not include an advance so advanced made on or after the first day of July 1938 or a debt due to—

- (i) the Central Government or Government of any State
- (ii) a local authority
- (iii) a scheduled bank
- (iv) a co-operative society, and

(v) a trust or endowment for a charitable or religious purpose only.

(vi) a person, where the debt was advanced on his behalf by the Court of wards or a ward.

FOR
 K. J. Thomas
 Esq.
 Barrister
 at Law
 of the Court
 of the
 High Court
 of India
 (S. B. 1909.)

If there were two partners and each one of them had taken advances from the partnership firm and one may have taken more than the other, then one, who had taken more, would be liable to refund the money, but it would not be a loan. Similarly, here both the donee holders and the judgment debtors were partners in the property each being entitled to one third share. Certain amounts were paid to one of the co-debtors, which was entirely in excess to his share and, therefore, this co-debtor would be liable to refund the excess amount paid, but not as a debt or as an advance.

We might take the analogy of advances made up a one partner, who has time to time demands money for the work done by him. During the course of the contract, certain amounts are paid at times, but ultimately, if it is found that more had been paid than the amount of work done, then, as that time, the amount so advanced would not be a kind of debt as a loan, but would be an amount due on account. The amount which is due on account is clearly distinct from a debt. In a debt, when advance taken is such as is paid, it made both the debtor and the creditor know that the advance is being made as a debt, but when at the time of the advance neither the creditor nor the debtor knows whether it has been paid as excess of the share, in our mind, it cannot be called an advance as a debt.

Learned counsel for the appellants had relied on the case of *Gire Lalak v. Santoy Singh* (1). In this case the Full Bench has held that—

If an existing proprietary liability is substituted by a fresh liability secured by a mortgage or a pawn, the claim under the mortgage or the pawn must be held to be free irrespective of the manner in which the original liability arose. Thus, where some of the contract-appropriated money due to another creditor and in satisfaction of that liability creates a mortgage debt in favour of that other creditor, the transaction evidenced by the mortgage deed amounts to a loan, when the meaning of the

was so defined in the Agricultural Relief Act and the Debt Reduction Act.

On the basis of the above observation the learned counsel for the appellants argued that when there was a compromise that a debtor would be defined against the stress of the judgment debtor they agreed to treat it as a loan. With respect we are unable to agree with this contention. It was after the filing of the suit that this compromise came into existence and therefore any thing which had happened in the suit itself will not convert the nature of the original transaction. Actually in this case even in the date of the compromise it was not known whether the money would be due to the direct holders or not. Under the circumstances how can it be said that the promise on that date agreed to was a debt?

In case the answer was given before the filing of the suit and the promise had created a mortgage or promissory note the position might have been different and it may have been urged that though initially it was not a debt but by creation of the mortgage deed or a promissory note they turned into a debt.

We are therefore clearly of opinion that the decision of the court below is different from that the transaction does not convert to a debt in respect and if the statute was to be taken the U. P. Amended Debt Reduction Act will not be applicable at all.

But if we were to hold that it amounted to a debt we are of opinion that it would not be a debt within the definition of the word so defined in the U. P. Amended Debt Reduction Act. By sub-section (2) (i) read with clause (a) a debt is a person whose the debt was wharol on his behalf by the Court of Wards as a ward would not be a debt. There can be no manner of doubt that this payment had been made by the Court of Wards in the judgment debtor who was a ward at that time. If it was a debt at all it was made on behalf of the debtors/holders. Therefore within the meaning the case clearly falls and even if we were to assume that it was an advance, on cash and was a transaction which is

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¹⁰² Although it is not clear whether the debt is on account of dinner, (ii) it would be corrupted within the meaning of "debt" as defined in the U. S. Secondary Debt Reduction Act.

If the above Act does not apply then section 9 would also not apply because it applies to a decree to which that Act applies. Moreover, in the present case there had been a definite agreement between the parties that in case the partnership is abolished the amount would be payable from the partnership money. In the circumstances the decree holders are entitled to realize the amount from the partnership money and their realization applications should proceed. We therefore set aside the order in the appeals as well as the reasons. All of these are dismissed with costs.

Since the driver is an old man and since three persons have been residing here for some time the record of the case shall be sent back to driver to the court below, so that the occurrence of the driver may be made at an early date.

Abstract and Keywords

SUPREME COURT
APPELLATE CRIMINAL

Before Mr. Justice Friesen, Mr. Justice Kuper, Mr. Justice
Sackville and Mr. Justice Macleod.

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STATE OF ILLINOIS SENATE
JANUARY 11, 1906.

Not Applicable since the High Court of Australia is not a court of appeal.

Objection will not be sustained by the Court of Sessions—Proceedings before the Magistrate—Subsequent decision is adverse to Sessions—Proceedings to be followed—Effect of numerous former—Code of Criminal Procedure: 1898 c 206 211 212 213 247 248, and 249

It is also not exclusively suitable for the Court of Session process in a narrow or common case and Mr Magistrate is a law agent (only) to counsel the accused in Session, a function obligatorily provided under s. 17(3) of the Code of Criminal Procedure and the fact remains to follow, the conclusion last drawn.

articles 220-222 of the Code may of course be more but only so far as not covered by the latter provisions.

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Accordingly if the Magistrate after the statement of the complainant under s. 200 of the Code makes statements to the accused for a charge under s. 480 Indian Penal Code—statements alleged as the complaint being in this connection immaterial—examining the prosecution witnesses records the statements of the accused then, apparently, and there being a charge still common, the accused to the Court of Sessions without complying with the provisions of s. 205 of the Code, returning of finding the accused of his wilful denial of his right to give evidence or otherwise—the possibility of his choosing to deal with evidence freely for this purpose, witnesses the statement is not at law.

The breach of s. 205 is of itself sufficient to render prejudicial to the accused and failure of justice and there is no question of the application of s. 211 of the Code in such circumstances. The court below is not, therefore, to be quashed on this ground alone.

Quere whether the same consequences must necessarily follow on a strict breach of ss. 211, 212 and 213 of the Code.

Police v. Karpas v. King Karpas (3) applied.

Criminal Appeal No. 145 of 1939, from an order of the Madras High Court dated 26th May 1937 in Criminal Reference No. 148 of 1936.

The facts appear in the judgment.

G. S. Pathak, Senior Advocate (Mohan Behar Lal, Advocate with him) for the appellants.

G. C. Marlar and C. P. Lal, Advocates for G. N. Dutt, Advocate for respondents no. 1.

Jayaram Murthy, Advocate for the respondents no. 2.

The following judgment of the Court was delivered by—

WILCOX, J.—This is an appeal on a certificate granted by the Madras High Court in a criminal matter. The facts of the case may be set out in some detail as being not the point raised in the appeal. A complaint was filed by Kapadia Kanar Jam against the four appellants and three others under sections 489, 493, 497, 451 and 437 A of the Indian Penal Code. It is not necessary for present purposes to set out the details of the complaint. Suffice it to say that after the statement of

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of the complainant under section 208 of the Code of Criminal Procedure (hereinafter referred to as the Code) summons were read in the accused person's presence, that to answer a charge under section 406 of the Penal Code. Prosecution witnesses were then examined and cross examined and the statements of the accused persons recorded. The Magistrate then heard arguments on the question of issuing of charges which were concluded on 23rd September 1934. It was then ordered that the case should be put up on 26th September 1934 to issue. On that day the Magistrate issued charges against the two appellants under sections 402 and 403 read with section 471 and 473 A of the Penal Code. On the same day the Magistrate ordered commitment of the four appellants to the Court of Sessions on these charges. The remaining three accused were discharged.

There was then a revision petition by Rajendra Kumar Jais against the discharge of one of the three accused namely Naran Lal. When the revision came up before the First Additional Sessions Judge Aggar he ordered the case on 16th April 1935 when a period of 14 committal order for Naran Lal be committed to the Court of Sessions to stand his trial. In view of this order he dismissed the revision petition as infructuous. Thereupon Naran Lal went on revision to the High Court. That petition was heard by Mr. J and he set aside the order of commitment of Naran Lal and one of the reasons given by him for doing so was that a Sessions judge was not empowered to direct a trial and a trial on trial of commitment, and he had relied on such evidence as the accused might produce before him. As Naran Lal had not been called upon to produce evidence as directed the order of commitment made by the Sessions Judge was held to be not in accordance with law. This order was passed on 21st October 1935. Thereupon on 7th January 1936 the two appellants filed a revision petition before the Sessions Judge praying that the order of commitment passed against them be quashed and that the case remain adjourned in support of this petition was that the learned Magistrate had not observed the mandatory provisions of law laid down in sections 208 to 213

of the Code which were essential for a valid commitment. This question came up before the same First Additional Sessions Judge and he made a reference to the High Court that as the procedure followed by the Magistrate was irregular the order of commitment dated 30th September 1934 was bad in law, and should be quashed.

This reference came up for hearing before another learned Judge of the High Court, namely (Gowdamer, J.) and he took the view that the Magistrate had not failed to comply with the provisions of sections 200 and that non-compliance with the provisions of sections 211 and 212 was curable under section 237 of the Code. He therefore rejected the reference. There was then an application for a certificate to appeal to the Court which was allowed, particularly as the view taken by Gowdamer, J. was in conflict with the view taken by Row, J., already referred to.

The main question of the appellants before us is then as the case began before the Magistrate as a warrant case under section 446 of the Penal Code, it was wrong here apart from the Magistrate, when he directed, in view of the provisions of section 247 (2) of the Code, that the case should be committed to the Court of Session, to follow the procedure provided in Chapter XVIII of the Code and inasmuch as he had failed to comply with sections 200 up to 212 of the Code the commitment was bad in law and should be quashed.

The first question that calls for consideration then, is whether the Magistrate when he began this case was proceeding in the manner provided for the trial of warrant cases. Section 247 (2) of the Code comes into play when in any stage of the proceedings in any trial before a Magistrate it appears to him that the case ought to be tried by the Court of Session; he has then to commit the accused under the provisions hereunder, committed. The learned Judge who made the reference held that the case before the Magistrate proceeded from the beginning as if it was a trial of a warrant case. It was on that issue that the Sessions Judge held that when the Magistrate made up his mind that the case ought to be committed to the Court of Session in view of the

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provisions of section 147 (1) of the Code it was his duty to observe the procedure laid down in Chapter XVIII particularly, under sections 208, 211 and 212 of the Code. The order of reference was sent to the Magistrate for explanation if any, and the Magistrate replied that he had no explanation to submit. He did not say in his explanation that he was not proceeding as in a warrant case and that the proceedings before him throughout were proceedings in the nature of an inquiry under Chapter XVIII. When however the matter came up before the High Court, Government, J. was of opinion that though the Magistrate was competent to try the case, as nowhere had been stated under section 466 Indian Penal Code only it was open to him to hold an inquiry under Chapter XVIII from the very beginning in view of the provisions of section 207 which empower a Magistrate to follow the procedure provided in Chapter XVIII in cases exclusively triable by a Court of Session and also in cases which are not exclusively triable by the Court of Session but, which in the opinion of the Magistrate ought to be tried by such court. The High Court was further of the view that the officer mentioned in the summons should be deemed to have given notice in the accused that it was optional with the Magistrate to hold an inquiry with a view to commit them to the Court of Session or to try them himself as in a warrant case because column 3 of Schedule II of the Code says that a case under section 466 is triable by a Court of Session, Presidency Magistrate or Magistrate of the first or second class. Therefore according to the High Court the matter was at large whether the Magistrate was going to adopt one procedure or the other, despite the issue of summons under section 466 of the Penal Code and that nothing had happened to reduce the belief in the accused that they would be tried as in a warrant case. The High Court, therefore, held that the case was proceeded with from the beginning as if it was an inquiry under the Chapter XVIII and on that view it held that there was no non-compliance with section 208 of the Code. As for non-compliance with sections 211 and 212 the High Court was of the view that it was allowable under section 147 of the Code as no prejudice was caused.

We must say with respect that the view of the nature of the proceedings before the Magistrate is not correct. It is true that it is open to a Magistrate to hold an inquiry from the beginning under Chapter XVIII in a case not exclusively triable by the Court of Session. But the mere fact that the Magistrate has such power does not necessarily induce to the accused that he is holding an inquiry under Chapter XVIII rather than a trial before himself. Where the case is not exclusively triable by the Court of Session, the accused would naturally conclude that the proceedings before the Magistrate are in the nature of trial and not an inquiry under Chapter XVIII. If the Magistrate intends to use his powers under section 207 and hold an inquiry from the beginning in a case not exclusively triable by the Court of Session, the only way in which the accused can know that he is holding an inquiry and not a trial, is by the Magistrate informing the accused that he is holding an inquiry under Chapter XVIII and not a trial. If he fails to do so, the accused can reasonably conclude that a trial is being held. In this case undoubtedly the Magistrate did not induce to the accused from the beginning that his proceedings were in the nature of an inquiry under Chapter XVIII. Therefore the accused would naturally conclude that the proceedings before him were in the nature of a trial of a warrant case as the summonses that they had received were under section 495 of the Penal Code only. The fact that in the subsequent section 497, which is exclusively triable by a Court of Session, was mentioned, is of no consequence for the summonses to the accused were only for a trial under section 495 of the Penal Code. It must therefore, be held that the proceedings before the Magistrate began as in the trial of a warrant case and if the Magistrate was at a subsequent stage of the proceedings was of the view that the case should be transferred to the Court of Session, he would have to act under section 443 (1) of the Code. We have been at pains to refer to this aspect of the matter for consideration would be different if the case was exclusively triable by the Court of Session and began from the outset as an inquiry under

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Chapter XVIII. What is said, hereafter, must therefore, be taken to apply only to a case which begins as a proceeding in a written or summons case and in which the Magistrate at a later stage takes action under section 347 (1).

This brings us to a consideration of the duty of the Magistrate who takes action under section 347 (1) of the Code. That section reads as follows:

If in any inquiry before a Magistrate or in any trial before a Magistrate before signing judgment it appears to him at any stage of the proceedings that the case is one which ought to be tried by the Court of Session or High Court, and if he is empowered to commit for trial, he shall commit the accused under the provisions hereinafter contained.

The first question that has to be decided is the meaning of the words "under the provisions hereinafter contained." These words have been the subject of discussion by a number of High Courts and the High Courts are unanimous that they mean that if the Magistrate decides at some stage of the trial to commit the accused he has to follow the provisions contained in Chapter XVIII. It is not necessary to refer to those provisions, for the words themselves are quite clear. They lay down that if the Magistrate comes to the conclusion that the accused ought to be committed for trial he shall commit in accordance with the provisions contained in the earlier part of the Code, namely in Chapter XVIII. This of course does not mean that the Magistrate must begin over again from the beginning. All that he has to do when he decides that the case ought to be committed is to inform the accused and see that the provisions of Chapter XVIII are complied with so far as they have not been complied with up to the stage at which he decides that there ought to be a commitment. Now the procedure under Chapter XVIII is laid down in sections 208 to 213 of the Code. The Magistrate begins by hearing the complainant if any, and takes all evidence that may be produced in support of the prosecution or on behalf of the accused or in the Magistrate

may call himself. The Magistrate is also required to make provision to safeguard the attendance of any witness or the production of any document or other thing if the complainant or officer conducting the prosecution or the accused appears to him. After the evidence under section 208 has been taken the Magistrate then examines the accused for the purpose of enabling him to explain any inconsistencies appearing in evidence against him under section 209. Thereafter if he is of opinion that there are not sufficient grounds for committing the accused for trial, he can discharge him unless it appears to him that such person should be tried before himself or some other Magistrate in which case he has to proceed accordingly. On the other hand, if the Magistrate is of opinion after taking the evidence and examining the accused that there are sufficient grounds for committing the accused for trial, he has to frame a charge under section 210 declaring with what offence the accused is charged. The charge is then read over and explained to the accused and a copy thereof if he so requires, is furnished to him free of cost. After the charge is framed the Magistrate calls upon the accused under section 211 to furnish a list of persons orally or in writing whom he wishes to be summoned to give evidence on his trial. The Magistrate may also allow the accused to furnish a further list at a later stage in his defence. Section 212 gives power to the Magistrate in his discretion to summon and examine any witness named in any list under section 211. Then comes section 213 which lays down that if the accused has refused to give a list as required by section 211 or if he has given one and the witnesses, if any, included therein whom the Magistrate desires to examine, have been examined and examined under section 212 the Magistrate may make an order committing the accused for trial by the High Court or the Court of Session and shall also briefly record the reasons for such commitment. On the other hand, if he is satisfied after hearing the witnesses for the defence that there are not sufficient grounds for committing the accused, he may cancel the charge and discharge the accused.

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Commitment
for trial
by High
Court or
Court of
Session

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 Chapter
 18, Sec.
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 Section
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 Section
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It will be seen from this analysis of the provisions relating to commissions that section 208 gives a right to the accused to produce evidence in defence before the Magistrate examines him under sections 209 and proceeds to frame a charge under section 214. Now when a Magistrate makes up his mind to commit a case not exclusively suitable by the Court of Session under the power given to him under section 247 (1) of the Code, he has to follow this procedure. But as we have said earlier it is not necessary that the Magistrate should begin from the beginning again when he so makes up his mind. The Magistrate may make up his mind at any stage of the trial before him and generally speaking four contingencies may arise. Firstly, he may make up his mind after the trial is practically over and the witnesses for the prosecution have been examined and cross-examined after the charge, the accused has been examined and both under sections 209 and 247 of the Code and all the defence evidence has been taken. In such a case sections 208, 209 and 214 have been complied with and all that the Magistrate has to do is to witness to the accused that he stands to answer him for trial and ask him to give the list of witnesses under section 211 and proceed thereafter as provided in Chapter XVIII. Secondly, the Magistrate may make up his mind after all the witnesses for the prosecution have been examined and cross-examined and the charge has been framed but no defence has been taken. In such a case that part of section 208 which lays down that all the evidence for the prosecution shall be taken has been complied with and the Magistrate may then proceed to comply with the rest of section 208 and take the defence evidence and then proceed further under sections 209 to 214 and amend the charge so as to make it conformable to a charge in an inquiry under Chapter XVIII or commit it. Thirdly the Magistrate may make up his mind after some of the prosecution witnesses have been examined and cross-examined and a charge has been framed. In such a case he has to examine the rest of the prosecution witnesses under section 208 and take the defence evidence, if any, produced by the accused and then proceed under sections 209 to

213 amounting or cancelling the charge already framed as indicated earlier. Lastly the Magistrate may have only just begun taking evidence for the prosecution and may not have framed a charge. In such a case he takes the rest of the prosecution evidence and compares with the provisions from sections 208 to 213. But in each of these four contingencies it is the duty of the Magistrate to ascertain to the accused that he has made up his mind to proceed in view of the provisions of section 347 (3) and then proceed in the manner indicated above. It is necessary that the accused should know when the Magistrate makes up his mind to commit so that their right under section 208 to produce defence if any before commitment is made is safeguarded.

Now what happened in this case was that. The Magistrate had apparently taken all the prosecution evidence and the prosecution witnesses had been examined and cross-examined; the Magistrate had framed no charges up to 30th September, 1954. He had heard arguments on the question whether any charges should be framed and had fixed 30th September, 1954, for orders in this respect. When therefore he decided on 30th September, 1954, that the case ought to be committed to the Court of Sessions, the proper course for him was to refrain from framing any charges and inform to the accused that he intended to commit them for trial. He then should have called upon them to produce defence evidence, if any, under section 208 and then proceeded further under Chapter XVIII. The Magistrate, however, failed to inform the accused that he had made up his mind to proceed under section 347 (1) and to commit them for trial. What he did on 30th September, 1954, was to frame charges. Freshwork and issued an order committing the accused to the Court of Sessions under section 213 of the Code. He then depured them of their right to lead defence evidence, if any, under section 208. It may be that if he had told them that he was going to proceed under section 347 (1) and commit them for trial and asked them if there was any defence evidence to be produced, they might have said that they did not wish to produce any

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defence before him at that stage. But what the accused would have said if the Magistrate had proceeded in this manner is irrelevant in considering the question whether the Commissioner in this case was led to law inasmuch as it did not comply with section 218 so far as giving the accused an opportunity to lead defence evidence, if any, was concerned. The fact remains, therefore, that in this case the Magistrate when he decided to act under section 247 (1) did not ensure that decesses in the accused and proceeded forthwith to commit them for trial under section 218, thus depriving them of the right to produce defence evidence, if any, under section 218.

The next question which falls for consideration is the effect of that non-compliance with section 218 of the Code and whether it is curable under section 247 of the Code. The effect of non-compliance with various provisions of the Code and whether such non-compliance is curable under section 247 have been the subject of a large number of cases before various High Courts and also before their Lordships of the Judicial Committee of the Privy Council. It is not necessary to refer to this mass of authorities. One of the earliest of these cases decided by the Privy Council is *Subramanyam Iyer v. King Emperor* (1), while one of the latest is *Pushkara Kanaya v. King Emperor* (2). The law was summed up by their Lordships of the Judicial Committee in *Pushkara Kanaya's case* (2) at p. 75 in these words:

When a trial is conducted in a manner different from that prescribed by the Code (as in *N. A. Subramanyam Iyer's case* (1)), the trial is bad, and no question of curing an irregularity arises. But if the trial is conducted substantially in the manner prescribed by the Code but some irregularity occurs in the course of such conduct, the irregularity can be cured under section 247, and notwithstanding so because the irregularity involves, as must nearly always be the case, a breach of one or more of the very commandments pronounced of the Code. The distinction drawn in many of the cases in India between an irregularity and an irregularity is one of degree rather

(1) 1891, L.R. 16 I.A. 227.

(2) 1946, L.R. 76 I.A. 61.

than of kind. This view finds support in the decision on the three Lordships. Based on *Abdul Rahman v. King Emperor* (1) where failure to comply with section 264 of the Code of Criminal Procedure was held to be cured by sections 235 and 237.

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Magistrate
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These observations were quoted with approval by the Court in *Narain Das v. The State of Andhra Pradesh* (2). It seems, therefore, desirable to consider whether the non-compliance with section 238 in this case is an irregularity which cannot be cured under section 237 or an irregularity which is curable thereunder. As the stage of trial has not been reached in this case, no question arises of considering whether the trial has been conducted in a manner different from that prescribed by the Code. What we have to see is whether the breach of section 238 which has occurred in this case is such that the Court will presume prejudice to the accused by the mere fact of the breach. If such presumption can be made the breach would obviously be not curable under section 237 of the Code, even assuming that that section applies. The question therefore, which even easily arises is whether the breach of section 238 is of such a character that the Court will presume that there has been prejudice to the accused by the mere fact of the breach. Now the accused has a right under section 238 to produce evidence in defence, if any before the Magistrate proceeds to decide whether a charge should be framed or not. The Magistrate's decision whether the charge should be framed or not is based on the evidence, one way or the other if evidence is produced by the accused, for the Magistrate would then be bound to consider the effect of that evidence on the question of framing the charge.

If the accused is denied the opportunity of leading the evidence which he has a right to do under section 238 it seems to us that the denial of such right is sufficient to cause prejudice to the accused and section 237 would have no application to a case of this kind. The possibility that the accused may not

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have produced evidence if asked by the Magistrate whether he would do so is of no consequence so far as this appellant is concerned. If that is the reply expected, it makes it all the more incumbent on the Magistrate to inform the accused that he was intending to commit the case and ask him if he wished to produce evidence. If the accused did not want to do so, the Magistrate would have done his duty and his way would be clear to proceed further with his intention to commit the accused. But when the Magistrate did not inform us the appellants in this case that he was intending to commit them for trial and proceeded to frame charges and pass the order of committal forthwith on 30th September, he was denying to them their right to postulate defence under section 208 of the Code. The denial of that right is in our opinion in itself sufficient to cause prejudice to the accused and failure of justice inasmuch as the accused were prevented from leading evidence which might have induced the Magistrate not to frame a charge against them or commit it. We are therefore, of opinion that the breach of section 208 which took place in this case was such as was bound to cause a failure of justice and there is therefore, no question of the application of section 537 in these circumstances. The committal is, therefore, bad in law and must be quashed on this ground alone.

In the petition of appeal, the appellants have referred also to breach of provisions of sections 211, 212 and 213 of the Code. As we have come to the conclusion that the breach of section 208 in this case is sufficient, to vitiate the committal, it is not necessary to consider the effect of the further breach of sections 211, 212 and 213. What we have said in this case with respect to the effect of the breach of section 208 may not be taken as applying to the breach of sections 211, 212 and 213 for the considerations arising out of these breaches may be different.

We therefore allow the appeal, quash the order of committal as well as the charges framed and send the case back to the Magistrate to proceed in the manner indicated above according to law.

Appeal allowed

APPELLATE CIVIL

Before Mr. Justice P. D. Bhargava*

DIVISIONAL SUPERINTENDENT, NORTHERN
RAILWAY MORARABAD (APPELLANT)

v.

UMRAO (RESPONDENT)

1948

November
21

*Workmen-Deputy-Lowee-Cases of employment-discontin-
uance of service-Cases of employment resulting of-
Compensation-Workmen's Compensation Act 1925 s. 10
and 1(1) applied*

Umrao the respondent was a gangman at the Railway Crossing gate no. 218 near Jaidpur. On September 4, 1947, when he was at his quarters he was attacked by the dappers who came there to loot the weapons and he sustained injuries on the left hand and right eye. He claimed compensation under the Workmen's Compensation Act claiming that he got the injuries in the course of his employment and during one of it. The defence was that the respondent was on sick leave on that day and was not in the course of employment and also no injury as required under s. 10 of Act was given within a reasonable time.

The Workmen's Compensation Commissioner found that Umrao received injuries in his eyes in an encounter with persons who wanted him to reduce the maintenance of the Railway crossing. Umrao though on sick leave was in the Railway quarters in the capacity of a watchman and sustained injuries in work. Rs. 1,000 was awarded as compensation to Umrao the respondent. The Railway has come on appeal.

Held, that although s. 10 of the Workmen's Compensation Act is mandatory with regard to the nature of the accident to be given, in the manner provided under the Act but the effect of this mandatory provision is greatly taken away by subsequent provision to that very section which provides that the want of any defect or negligence on a master shall not be a bar to the maintenance of a claim of the employee or any one of several employees or any person responsible to the employer for the management of any branch or the trade or business in which the injured workman was employed had knowledge of the accident from any other source as to about the time when it occurred and the want of notice in the present case is not fatal to the claim.

*Sitting at Lucknow

The Commission framed the following four issues:

(1) Was there any occurrence of duress in the Railway Quarter?

(2) Whether it was obligatory on the part of the workmen to live in the Railway Quarter?

(3) Did the section require in procuring Railway property?

(4) Is the claim for compensation preferred within time?

If so, to what amount of compensation the workmen is entitled?

The finding of the Workmen's Compensation Commission was that Urmoo sustained injuries on his eyes in an encounter with persons who wanted him and other gate men to violate the instructions of the Railway authorities. Urmoo, though on sick leave, was in the Railway quarters in the capacity of a workman and sustained injuries as such. He further held that the claim was not barred by time and, therefore, he awarded Rs 1,000 as compensation to the respondents.

Aggrieved by that decision of the court below the Divisional Superintendents, Northern Railway, Muzda, had, has come up in appeal.

Learned counsel for the appellants had first urged, that though an objection had been taken to the written statements about the validity of the claim on the ground of want of notice yet no issue was framed on that point. It was contended by the learned counsel for the appellants that the words of section 10 of the Workmen's Compensation Act are mandatory when they say that

no claim for compensation shall be examined by a Commissioner unless notice of the accident has been given in the manner hereinafter provided as soon as practicable after the happening thereof. According to the counsel for the appellants if no notice is given within a reasonable time, the claim of a workman should be thrown out or barred on that ground alone.

On behalf of the respondents it has been urged that though the words used in the opening portion of section

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Section 10
of the
Workmen's
Compensation
Act
is
mandatory
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claim
is
barred.

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 CHAPTER 1
 SECTION 1
 SUBSECTION 1
 PARAGRAPH 1

is not so, but their effect has been greatly taken away by the subsequent proviso to that very section. The second proviso is to the following effect:

Provided further that the want of or any defect or irregularity in a notice shall not be a bar to the maintenance of a claim—

(a)

(b) if the employer or any one of several employers or any person responsible to the employer for the management of any branch of the trade or business in which the injured workman was employed had knowledge of the accident from any other source at or about the time when it occurred.

It was argued on behalf of the respondent that by means of Ex. P. 1 the F. W. Inspector had informed the appellant at least on 5th February, 1954, that an accident of this nature had taken place and the respondent while he was on sick leave had received injuries to his hand and right eye while helping Ram Nakh and Nisha who were assaulted by thieves on 4th September, 1953, while on duty. It was further contended that in this particular letter there was reference to two other previous letters by the same office to the appellant, which were, dated 18th September, 1953 and 5th October, 1953. By an application the respondent had asked for the production of these documents, but they were withheld by the appellant and therefore it was argued that a presumption should be drawn against the appellant in the effect that the letters contained an admission of the accident, and if the letter, dated 18th September, 1953, had any relevance of this accident then the respondent was protected by the second proviso to section 19 of the Act. In my opinion, I do not think that want of notice in the present case is fatal to the claim.

Again from this provision, there is another provision in the same section, which further provides that the Commissioner may examine and decide any claim to compensation in any case, notwithstanding that the notice

has not been given, or the claim has not been preferred in due time as provided in that sub-section, if he is satisfied that the failure to so give the notice or prefer the claim, in the case may be, was due to sufficient cause. In any event, if the Commissioner has sustained the claim in the present case, I do not think that I sitting as an appellate court would be justified in reversing his decision on that ground.

It was further conceded by the learned counsel for the respondents that as a matter of fact this power was not possessed at all otherwise he would have got an issue framed on the point before. In any event as I have said earlier, that view of answer under section 10 is not fatal to the claim, it is not an estoppel that matters further.

The next ground urged by the learned counsel for the appellants is that the injury which the respondents sustained did not arise out of and during the course of employment, and they are the first agreements on which any employer can be made liable. Reference was placed on the words of section 3(1) of the Act which reads as follows:

If personal injury is caused to a workman by accident arising out of and in the course of his employment, his employer shall be liable to pay compensation in accordance with the provisions of this Chapter.

The sole question for consideration, therefore, is whether this injury arose out of and in the course of the employment. Admittedly the employee was on sick leave on the date of the accident and he was not expected to do any work on behalf of the employer so long as he was on sick leave. It was therefore contended, that he cannot be held to be "in the course of employment" and secondly if he was not in the course of his employment, then the accident did not arise out of the employment.

Learned counsel for the respondent relied on a full Bench decision of the Court reported as *Work*.

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 (Sergeant
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 Appeal
 from
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 Court
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*Manager, Carriage and Wagon Shop, E. J. Mc
 Mahon* (1) where it was observed as follows:

The word *employment*, as of wider import than the word *work* or *duty*. The expression is the course of employment means not only the actual work which the man is employed to do but what is incident to it, as the course of his service. The expression is not to be regarded as confined to the nature of the employment. It applies to employment as such, i. e. in its nature its conditions, its obligations and its incidents. It would then include not only the period when he is doing the work usually assigned to him but also the time when he is at a place where he would not be but for his employment.

The court for the respondent had had great stress on the words *actual conditions* and *obligations* of the employment, and also on the words, when he is at a place where he would not be but for his employment. According to him the Rules of the Railway Administration made direct that all quarters shall be in their quarters, at the gate and therefore the respondent was at that place owing to one of the conditions of his employment, and as such he should be deemed to be in the course of his employment. The facts of this case were entirely different from the facts of the present case and do not help the respondent in this case. That was a case where the accident had happened in the railway yard while the employee was going to his duty and the question was whether he would be deemed to be in the course of his employment. So far as the periods when an employer leaves his house for the place of his employment and also the time when he leaves it for his residence are concerned, it has been held in numerous cases that time and place will be deemed to be during the course of his employment. It would be saying exactly a different thing altogether that if gatemen are supposed to live in their quarters they should be deemed to be all the twenty-four hours in the course of employment, and

if anything happened at any time during this period the employer would be responsible. When a person is on leave, he is not at all on the score of his employment. He is not supposed to do any work for the employer and, therefore, by no stretch of the words "in the course of employment," it could be said that such a case would be covered by section 3 of the Act. The first ingredient that is necessary in order to establish that the employee was, in the course of employment, was that the person injured must have been on duty at that time and must be supposed to do some work. Whether he is doing that work or not, or he is doing some other work is immaterial but if he is supposed to do some work then he would be deemed to be on the score of the employment. A gentleman when he is on duty, whether any train is passing at that time or not would be supposed to be on duty. He may be that time be doing nothing or trifling yet he would be in the course of employment. On the other hand, if a person is not on duty and he takes upon himself to do something which he thinks ought to be done for his employer, he will not be deemed to be in the course of his employment. It is not the work which is being done that determines whether a person is in the course of employment or not. It is only, whether he is expected to do anything during the period or not. It is immaterial whether he is doing any particular work or sitting idle, but he must remain there. Thus as I have said that if a person is on leave he is not supposed to do any work, and would therefore not be on duty.

Learned counsel for the respondent further relied on the case reported in *E. C. Nick v. Johns-Manville* (1). In that case an engine driver was employed on a steam launch during the whole round voyage. In the course of the voyage a temporary halt was made. During that halt an accident took place to the engine driver while doing certain repairs to the engine and the boiler as a result of which he died. It was held therein that because during the voyage a temporary halt was made, it could not be said that the engine driver's employment

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which one might have been acquired and the amounts made in the Compensation Assessment Roll by the Compensation Officer reducing the amount on the above basis to whole acres and eighth acre fractions.

Civil Miscellaneous Writ Petition no. 103 of 1958

The facts appear in the judgment.

Iqbal Ahmad and Shiva Gopal for the applicant.

The Senior Standing Counsel and Kirti Bir Prasad for the respondent.

Taxation, J. —The petitioner was Taluqdar of Rohna Estate in the district of Bahawalpur. He owned 58 villages described in Schedule A to that petition. By a notification made under section 4 of the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950, all his interests in the said villages as Taluqdar was acquired under the said Act and he became entitled to payment of compensation in lieu thereof.

Chapter III of the Uttar Pradesh Zamindari Abolition and Land Reforms Act lays down the procedure for determination of compensation payable to intermediaries whose estates have been acquired under the Act. Section 39 provides the manner in which gross assets, as respects a taluq, shall be computed and section 40 contains provision for the preparation of draft Compensation Assessment Roll in respect of each intermediary separately. Section 42 says how the gross assets of an intermediary shall be arrived at. Then comes section 43 which requires net assets of every intermediary to be determined. Section 44 says that after the draft Compensation Assessment Roll in respect of any intermediary has been prepared the same shall be published in the manner laid down in it. While persons desiring to file objections will also be required to do so within a period of two months. The next two sections make provision for the hearing and deciding of objections. Under section 49 the order of the Compensation Officer deciding objections is to be deemed to be a decree of a civil court and an appeal therefrom to the District Judge is permitted by section 50.

The next two sections 54 A and 51 are not relevant at the present occasion. Section 52 provides as under:

'52 (1) Where an objection has been filed in regard to the draft Compensation Assessment Roll in pursuance of the notice under section 46 or where such objections are filed and have been finally disposed of and the draft Compensation Assessment Roll amended, altered or modified accordingly, the Compensation Officer shall sign the same and also affix his seal thereto.

(2) The Compensation Assessment Roll when so signed and sealed shall become final.'

Under section 53 a copy of the Compensation Assessment Roll is to be delivered free of charge to the intermediary concerned by the Compensation Officer. The same relevant provision in section 63 which says that the amount of compensation determined under sections 54 or 55 as payable to an intermediary shall be declared by the Compensation Officer in respect of his interest in the mahal in which the Compensation Assessment Roll relates and the Compensation Officer shall record it in the roll in his own writing. Then comes section 65 which says that, except as provided by or under the Act, no correction shall be made in the Compensation Assessment Roll after it has become final. Sub-section (2) of this section, however, permits the Compensation Officer at any time before the payment of Compensation to correct any clerical or arithmetical mistakes in the Compensation Assessment Roll or any error arising thereon from any accidental slip or omission. That he may do so on motion or on an application filed by the person interested.

In the present case there is no dispute that the Compensation Assessment Roll in respect of 98 villages had been finalized on 17th December 1954. The amount of compensation payable to the petitioner on the basis of the final Compensation Assessment Roll was also determined and entered in the final Compensation Roll.

Nearly ten months after the finalization of the Compensation Assessment Roll the same was amended by the

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Section 2

The provisions of the U. S. Tax Reform Act relating to the assessment of compensation have been noticed above. The scheme of sections 59 to 64, in accordance with which the net assets of an intermediary are determined, contemplates that in the first place the Compensation Officer shall find out the gross assets of a marshal and having done so he shall proceed to determine the gross assets of each intermediary in the marshal and in due and find out his net assets in the marshal in accordance with section 48. The next step payment of compensation is then a marshal and it is in that context that the Compensation Assessment Roll is prepared. Section 54 also provides that the amount of compensation payable to an intermediary shall be in respect of his interest in the marshal. In other words, every intermediary is entitled to be paid compensation for his interest in a marshal which is to be treated as the unit and base of the compensation payable to him. Section 49 requires that the amount determined under section 54 as compensation payable to an intermediary shall be declared by the Compensation Officer and entered in his own writing in the Compensation Assessment Roll. Under section 55 the final Compensation Assessment Roll, which is prepared after all the objections in respect of the Draft Roll published earlier have been disposed of shall be signed and also sealed by the Compensation Officer. It further provides that the Compensation Assessment Roll when so signed and sealed shall become final. Once the Compensation Assessment Roll has, therefore, been signed and sealed a legal sanctity attaches to it, it becomes final and the amount entered in it as amount of the net assets of an intermediary becomes final between the parties, viz. the intermediary, on the one hand, and the State, on the other. It cannot be altered thereafter except, in so far as the law may have permitted it.

Under section 49 the amount of compensation payable to the intermediary, which is worked out on the basis of the final Compensation Assessment Roll, has also to be entered in the Roll. This again has to be done by the Compensation Officer in his own writing. The underlying idea throughout these provisions is that the Com-

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penetration Assessment Roll and the entries made thereunder have a liability about them. They are not to be altered, varied or amended except in so far as the law may have permitted. It is in accordance with this document that compensation becomes payable and neither party can ask or pay more or less. Section 61 of the Act, however, gives power to the Compensation Officer to remove error in it if they are errors arising from any accidental slip or omission or have been due to any arithmetical or clerical mistake. As a matter of fact sub-section (1) of this section has been provided in these terms:

Except as provided by or under this Act no correction shall be made in the Compensation Assessment Roll after it has become final.

restricted the power of the Compensation Officer to effect alterations in the Compensation Roll on the ground mentioned in sub-section (2) only. The law does not permit the Compensation Officer to effect any change in it unless he can attribute them to any error arising from any accidental slip or omission or due to any clerical or arithmetical mistake.

In the present case admittedly no such mistake or error existed in the Compensation Assessment Roll which finished on 27th December, 1954. The amount of compensation which was later entered in it under the hand of the Compensation Officer did not also similarly suffer from any such defect. The changes which have been made in it were done because:

(1) subsequently in 1955, long after the Compensation Assessment Roll had been finalized rule 35 B

(2) had been amended by the statute and a new provision, and

(3) the aggregate net assets of the intermediate were reduced by deducting there from the amount called as excess assets.

It is not possible by any stretch of reasoning to hold for a moment that the deduction becoming necessary on account of a subsequent change in the rules relating to the determination of proportionate agricultural income-tax were due to any accidental slip or omission or any

clerical or arithmetical mistake. On the other hand, the statement, as it was prepared and furnished in December 1956, was in accordance with the rules then in force. There was thus no the respondents can showing no error or mistake in its preparation in the manner it was prepared. If later after the Rule has been issued the law is amended unless the law itself provides that it shall have retrospective operation and further that any rules already framed shall also be amended, secondly it will not undermine the authority vested in effect any changes. Such law itself has to do so on the pretext of removing any mistake or error. I have not been able to find anything in the proviso that was added to this rule (Quarterly 20 B in 1955) to give retrospective operation. As a matter of fact the further question can also be raised viz. whether the State Government had power under the law to make a rule with retrospective operation, but it is not necessary to deal with this aspect further because as I have said earlier there is nothing in this proviso or elsewhere to show that it was to have retrospective operation. That being so the Comptroller Genl. Officer was clearly wrong in conferring with the Comptroller Accounts Rule in 1957 on the strength of the amendments made in 1956. His action was not only contrary to law but wholly without jurisdiction. It has no legal effect.

Coming to the Second alteration by which the amount was first again reduced by Rs. 57,054 2 4, a reference to the relevant provisions of the U. P. Zamindari Abolition and Land Reforms Act, 1950 has already been made above. Under its provisions the unit of measurement and for payment of compensation is the extent of an immediately vested estate. The Scheme of the Zamindari Abolition and Land Reforms Act, envisages the acquisition of estates and through all the estates in the State of Uttar Pradesh were acquired by one notification under section 4 of the Act simultaneously and it was never contemplated in law such estate was acquired so to say separately for the purpose of decimation and payment of compensation. Article 31 of the Constitution contemplates that whenever property is acquired by the

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State of U.P.
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State for a public purpose, as was the case here, compensation shall be payable therefore by the State. If therefore the State acquired so many estates, it has to pay compensation for each of them.

It is at this background that the scheme for payment of compensation contained in the Zairudari Abolition and Land Reforms Act shall need to be considered and given effect to. If therefore an intermediary is entitled to a certain amount of compensation in respect of his interest which has been acquired in any estate the law entitles him to receive that compensation and the State also is bound to pay it. Because the act results in a certain estate happen to turn out on the market side and as a result of which he is the ultimate beneficiary gets no compensation therefore it will not entitle the State to adjust the compensation on the basis of other estates he bringing to the purchaser which too might have been acquired. If this principle is accepted viz that the Compensation Officer can adjust the various estates on the basis of the other estates the inevitable result will be that in the case of estates with many users and only three will be in acquisition but with the acquisitions the State will get more benefit because from the person whose property is acquired. This also never be the intention underlying Article 31 of the Constitution or of the provisions contained in the Zairudari Abolition and Land Reforms Act.

Again therefore I shall hold that the adjustment such as the Compensation Adjustment Bill by the Compensation Officer by which he reduced the amount by Rs-65,978.24 was without error and without jurisdiction.

As no other ground has been urged for or against I hold that this petition must succeed. The order of the Compensation Officer dated the 23rd October 1955 and the order dated 20th December 1957 are quashed. The petitioner will get his own from the respondents.

Panwar allowed.

SUPREME COURT

APPELLATE CRIMINAL

Before Mr. Justice Gopabandhu and Mr. Justice Rao
THE MUNICIPAL BOARD, MUMBAI

vs

KACHHAIYA LAL

[On Appeal from the High Court at Allahabad]

*Tells—Power of Municipal Board to levy cessation on
 Union Properties Municipalities Act 1916 s. 125(2)(g)*

1937
 October 4

Subject to any general rules or special orders of the State Government the power of the Municipal Board to levy toll on vehicles and under s. 125(2)(g) of the Union Properties Municipalities Act is confined to those entering the Municipality from places outside its local area.

The cess of a truck carrying coal from the quai at which is included within the municipal limits although the rest of the railway station is excluded therefrom is therefore not liable to the payment of toll claimed by the Municipal Board.

Criminal Appeal No. 88 of 1936 from an order of the Allahabad High Court dated 25th August, 1937 in Criminal Revision No. 24 of 1935.

The facta appear in the judgment.

S. P. Sinha, Senior Advocate (B. R. L. Deygus, Advocate) with him for the appellant.

The respondent was unrepresented.

The judgment of the Court was delivered by

SINHA, RAO J. —This appeal raises the question of true interpretation of section 125 of the Union Properties Municipalities Act, 1916 (hereinafter called the Act). The facts lie in a small compass and they are not in dispute.

The State Government issued a notification defining the municipal limits of the town of Mumbai. Under this notification the goods shed of the Mumbai railway station is included within Mumbai municipal limits but the rest of the station is excluded therefrom. A

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motorable road connects the station with the taxed or
 habited area of the town. The Municipality fixed a
 toll barrier on the road between the railway goods shed
 and the habited area of the town. The Municipality
 Electric Supply and General Mills Co. Ltd. Muzumbari,
 supplies electricity to Muzumbari Town. It purchases
 coal from places outside Muzumbari and carries the same
 in railway waggons, which are unloaded and kept in the
 goods shed. The respondent owns a truck. He was
 engaged to carry the coal from the goods shed to the
 premises of the electric company, which is outside the
 town. He loaded his truck with coal at the railway
 goods shed and was taking the same to the premises of
 the electric company when he was asked to pay toll tax
 at the toll barrier, but he did not pay it. He was prose-
 cuted under section 209(1) of the Act read with rule 1
 of the rules for assessment and collection of toll tax.
 The respondent denied his liability to pay the tax. The
 Sub-Divisional Magistrate convicted him under the said
 section and directed him to pay a fine of Rs.67 5. On
 appeal the learned Sessions Judge, Muzumbari, confirmed
 the same. In revision the High Court set aside the
 conviction and acquitted the accused. The Municipal
 body by special leave has preferred this appeal.

Learned Counsel for the appellant contends that on
 a true construction of section 128 of the Act and the
 Rules framed thereunder the respondent was guilty of
 the offence with which he was charged. As the question
 raised turns upon the construction of the said provisions,
 it would be convenient to read the relevant provisions
 at this stage.

§ 128.—(1) Subject to any general rules or spe-
 cial orders of the State Government in this behalf
 the State which is a bonded map imposed on the whole
 or any part of a municipality are—

- (a) a toll on vehicles and other conveyances, animals and laden coaches crossing the municipality

Section 153—The following matters shall be regulated and governed by rules except in so far as provisions therein is made by this Act, namely—

- (a) the assessment, collection or composition of taxes, and, in the case of excise or toll, the determination of rates or toll taxes

Enactment by the Municipality, Municipal

Rule 1— No person shall bring within the limits of the Municipal Municipality

Any laden vehicle or laden animal in respect of which a toll is leviable under section 1886/KS, 111-95 of 31st January, 1921—until the toll due thereof has been paid to such persons, and at such barriers as the board may from time to time appoint

Rule 2— Where any laden vehicle or any person in charge of a laden vehicle, or a laden animal, wishes to pass barrier, such vehicle or person shall pay the toll due to the collector at the barrier

Any breach of these rules amounts to an offence under section 299 (1) of the Act, and is punishable under the penalty clause of the rules which is in these words

Any breach of the rules 1, 2, 3 and 4 above shall be punishable with fine which may extend to Rs. 50 but shall in no case be less than ten times the amount due from the offender on account of the tax

The following ingredients of the offence may be gathered from a careful reading of the said provisions: (1) The toll is on vehicles; (2) a person cannot bring a laden vehicle without paying the prescribed toll within the limits of the Municipality from without; (3) the person in charge of such vehicle must pay a toll at the barrier; and (4) if he does not pay, he is liable to punishment. It is clear from the wording of the provisions that they are designed for collecting toll from laden vehicles entering the municipal limits from without

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Subject to any general rules or special orders of the State Government in that behalf—i. is not suggested that there are any such—the municipal board's power under section 128 (vi) of the Act to levy toll on any person is confined only to those crossing the municipal paly. The word crossing in section 128 (vi) of the Act clearly indicates that the conveyance to be liable to the toll must enter the Municipality from places outside it. By no stretch of language it is possible to hold that a vehicle which is already in the limits of the Municipality when it plans for here enters the municipal limits. So too, the words being within the limits of Municipal Municipality in rule 1 emphasize the idea that a laden vehicle cannot be brought within the Municipality until the toll due has been paid. One cannot bring within the Municipality a vehicle which is already in the Municipality. Contrasted with the clear terminology used both in the section as well as in the Rules, the learned counsel for the appellants attempt ed to argue that the words Municipal Municipality are comprehensive enough to take in part or parts of that Municipality and therefore when a laden vehicle passes from one part of the Municipality to another part, it has to pay toll if there is a barrier between the two parts. This argument may perhaps be ingenious, but to our mind it is clearly unsound. We find it well nigh impossible to hold that a vehicle is brought within the limits of the Municipality when it is brought from one part of the Municipality to another part.

In the result we agree with the construction put upon the section by the High Court. The appeal fails and is dismissed.

Appeal dismissed.